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IN THE

Supreme Court of the United States

October Term, 1939

No. 500

STATE OF MINNESOTA,

Petitioner,

vs.

NATIONAL TEA COMPANY and ALLIED STORES CORPORATION
(Formerly Hahn Department Stores, Incorporated),

Respondents.

BRIEF OF RESPONDENTS.

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BRIEF OF RESPONDENTS.

The opinion delivered in the Court below is officially reported in 205 Minnesota 443, and is also reported in 286 North Western 360.

STATEMENT.

These actions involve the constitutionality of Chapter 213, Laws of Minnesota, 1933, as amended by Chapter 16 of the Extra Session Laws of 1933-1934, imposing a so-called Chain Store Tax. The Act imposed both an occupa-

tional tax with rates based upon number of stores (generally referred to as the specific tax) and a graduated gross sales tax.

The Act became effective as of July 1, 1933. It was repealed as of January 1, 1937, by Chapter 93, Extra Session Laws of 1937, which re-enacted a specific tax only and eliminated the gross sales tax. The repealing act was passed by the legislature after the trial of these cases below but before decisions were filed. In these actions the only period concerned is from July 1, 1933 to December 31, 1936. The act now and since January 1, 1937 in force is not in any way in question.

The plaintiffs, operating chain store systems as defined by the Act, paid specific taxes for the last half of 1933 and for 1934 and 1935, and paid gross sales taxes for the last half of 1933 and the year 1934. Thereafter they brought these actions at law to recover the taxes so paid (a procedure expressly authorized by the Act), claiming the specific and gross sales taxes to be both unconstitutional and void. By agreement the actions were tried to the court without a jury, which made findings of fact and conclusions of law pronouncing the gross sales tax void but sustaining the specific tax. The gross sales tax was held repugnant to the State constitutional provision requiring taxes to be "uniform upon the same class of subjects" and to the equal protection clause of the Fourteenth Amendment. A money judgment was ordered and entered for each of the plaintiffs in the amount of the gross sales taxes paid with interest. No appeal was taken by the companies from the decision as to the validity of the specific tax, and that is not now in issue. The State appealed from the money

judgments, raising for review the question of the validity of the gross sales tax. In the Supreme Court of Minnesota there was an affirmance, and this Court granted certiorari.

The plaintiffs alleged the Act to be in violation of several provisions of the State Constitution. The State in its brief (page 3) says: "As to all of these provisions but one the State District Court held in favor of the validity of the Act." This is inaccurate. The court held the specific tax to be valid under each of the provisions (52, 84-5),* and held the gross sales tax void for violation of the inequality of taxation provision (50, 54, 83, 86), but made no determination as to the qualification of the gross sales tax under the other provisions, deeming it unnecessary, no doubt, to push the inquiry further.

Where the word "Act" is used herein, it is to be taken as referring to the gross sales tax only, unless the contrary is indicated.

SUMMARY OF ARGUMENT.

This Court is without jurisdiction. The decision of the Supreme Court of Minnesota rests upon an independent state ground, adequate to sustain it, viz., that t · Act in question is repugnant to the State Constitution. Were the decision subject to review as presenting a federal question, it should be affirmed. The classification for taxation sought to be established by the Act is unreasonable, arbitrary, capricious; and without relation to the purpose of the Act, and is in violation of the equal protection clause of the Federal Constitution and falls within the condemnation of the decisions of this Court in *Stewart Dry Goods Co. v.*

*Figures in parentheses refer to pages of the record.

Lewis, 294 U. S. 550, *Great Atlantic & Pacific Tea Co. v. Valentine*, 299 U. S. 32, and other cases, and of decisions of other courts in similar cases.

ARGUMENT.

I.

JURISDICTION.

Lack of jurisdiction is clear. While the action has drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States (Judicial Code, Sec. 237 (b), 37 Stat. 790, 28 U. S. C. A., Sec. 344 (b)), it has also brought into question the validity of the statute as being repugnant to the Constitution of the State of Minnesota. The State Supreme Court held the statute invalid for violation of the State Constitution, and also held it invalid for violation of the Federal Constitution. The former was an independent non-federal ground of decision and left no federal question in the case subject to review. That the State Supreme Court held the Act offensive to the State Constitution, and therefore void, is not open to question. Indeed, one of the State's assignments charges as error that the court did so hold (State's brief, p. 30, Assignment 1). Elsewhere the State says the Court was "in duty bound" to so hold (State's brief, p. 9). On this point the decision will be further analyzed after a brief review of the applicable decisions.

It has been long and uniformly held that the presence of a federal question gives this Court no jurisdiction to review the decision of a state court, if a decision of that question

was or is unnecessary to a disposition of the case because of the presence also of a determinative non-federal question. Otherwise stated, the rule is that this Court has no jurisdiction to review a state court judgment resting upon two grounds, one involving a federal question and the other involving an independent question of state law, the latter alone being sufficient to sustain the judgment. *Walter A. Wood Company v. Skinner,* 139 U. S. 393; *Eustis v. Boyles,* 150 U. S. 361; *Dibble v. Bellingham Bay Land Company,* 163 U. S. 63; *Bacon v. Texas,* 163 U. S. 207; *Allen v. Arguimbau,* 198 U. S. 149; *Leathe v. Thomas,* 207 U. S. 93; *Arkansas Southern Railroad Co. v. German National Bank,* 207 U. S. 270; *Metzger Motor Car Company v. Parrott,* 233 U. S. 36; *Browne v. Union Pacific Railroad Co.,* 267 U. S. 255; *Lynch v. New York ex rel. Pierson,* 293 U. S. 52; *Fox Film Corporation v. Muller,* 296 U. S. 207; *Honeyman v. Hanan,* 300 U. S. 14; *City of New York v. Central Savings Bank,* 306 U. S. 661; *McGoldrick, Comptroller v. Gulf Oil Corporation,* (Jan. 15, 1940) 84 L. Ed. 337.

Covered by this rule are cases where, as in the case at bar, state laws have been held void as being in violation of both State and Federal Constitutions. *Metzger Motor Car Company v. Parrott,* 233 U. S. 36; *Lynch v. New York,* 293 U. S. 52; *City of New York v. Central Savings Bank,* 306 U. S. 661.

A recent statement by this Court of the general rule is found in *Lynch v. New York ex rel. Pierson,* supra, as follows:

> "It is essential to the jurisdiction of this court, in reviewing a decision of a court of a state, that it must appear affirmatively from the record not only that a federal question was presented for decision to the high-

> est court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

In *City of New York v. Central Savings Bank*, 306 U. S. 661, the Court of Appeals of New York had held a section of the New York so-called Multiple Dwelling Law to be invalid on the ground that it violated the due process clause of the Fourteenth Amendment of the Federal Constitution and the due process clause (Article I, Section 6) of the Constitution of the State of New York, the clauses of both Constitutions being expressed in identical language. (279 N. Y. 266, 18 N. E. (2d) 151, as amended, 280 N. Y. 9, 19 N. E. (2d) 659).

On the motion for reargument and to amend remittitur, the Court of Appeals declared that there was logically no room for distinction between the clauses of the two Constitutions, and said:

> "Our conclusion that the statute is repugnant to article 1, section 6, of the State Constitution followed necessarily from our determination that in accordance with a long line of decisions of the Supreme Court of the United States the statute is repugnant to the Federal Constitution."
>
> 280 N. Y. 9, 19 N. E. (2d) 659.

The Court in its decision as originally filed declared:

> "A question under the Federal Constitution was duly presented and necessarily passed upon by this court. The plaintiff contended that chapter 713 of the Laws of the State of New York of 1929, as amended, is repugnant to article 1, section 10, of the Constitution of the United States and to the Fourteenth Amendment of that Constitution, U. S. C. A. This court held that such law is repugnant to article 1, section 10, of the Constitution of the United States and to the Fourteenth Amendment of that Constitution."

Upon the motion referred to, the remittitur was amended by adding thereto the language just above quoted from the original opinion.

Despite this insistence by the Court of Appeals that a federal question was presented and necessarily passed upon, this Court denied certiorari "for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it".

Assuredly, as will be more fully developed later, there is even less basis for jurisdiction of this Court in the case at bar than there was in the Central Savings Bank case.

The latest decision of this Court on this subject is in *McGoldrick, Comptroller v. Gulf Oil Corporation*, (Jan. 15, 1940) 84 L. Ed. 337. The Supreme Court of New York (9 N. Y. S. (2d) 544) held that an assessment of a city sales tax upon certain imported crude petroleum was invalid as a burden on foreign commerce and as being in conflict with certain regulations adopted by Congress in the exercise of its powers under the commerce clause of the Federal Constitution. The Court of Appeals of New York (22 N. E. (2d) 480) affirmed the Supreme Court, briefly

reviewing the proceeding in the latter court but without itself otherwise defining the ground of its decision. This Court granted certiorari (60 S. Ct. 260, 84 L. Ed. 219). After argument the writ was dismissed for want of jurisdiction, this Court saying in an opinion per curiam:

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax solely because of violation of the federal Constitution we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. Jud. Code, Sec. 237 (b), 28 U. S. C. 344 (b). Lynch v. New York, 293 U. S. 52; Honeyman v. Hanan, 300 U. S. 14; New York City v. Central Savings Bank, 306 U. S. 661."

In the case at bar, as will be later more fully shown, not only is there no explicit statement by the Supreme Court of Minnesota that it held the tax void solely because of violation of the Federal Constitution, but on the contrary there is what amounts to an explicit statement that the court did not hold the law invalid solely upon such ground, there being an explicit statement that the law was held invalid for violation of the State Constitution.

This Court, in the *McGoldrick* case, granted rehearing after the remittitur of the Court of Appeals had been amended (Jan. 23, 1940) to read in part as follows:

> "* * * In so far as the appeal taken by Joseph B. McGoldrick as comptroller of the city of New York is concerned, the affirmance was on the ground that the city sales tax as applied here violated article I, section 8, clause 3, and article I, section 10, clause 2, and article VI, clause 2, of the United States Constitution, and on no other grounds."

Of this Court attitude towards Constitutional questions it has said:

> "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."
>
> *Burton v. United States,* 196 U. S. 283, 295.

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."
>
> *Siler v. Louisville & Nashville R. R. Co.,* 213 U. S. 175, 193.

To give this Court jurisdiction "it must appear by clear and necessary intendment that the (federal) question *must* have been* raised and *must have been* decided in order to induce the judgment". Mr. Chief Justice Hughes in *Honeymann* v. Hanan, 300 U. S. 14.

Where a case presents both a federal and a nonfederal question, every legitimate doubt is resolved against this Court's jurisdiction. Where it does not appear upon which of two grounds the judgment was based, if the independent ground *on which it might have been based* was a good and valid one, sufficient in itself to sustain the judgment, this Court will not assume jurisdiction. *Klinger v. Missouri,* 13 Wall. 257, 263; *Eustis v. Bolles,* 150 U. S. 361, 367; *Dibble v. Land Co.,* 163 U. S. 63, 69; *Allen v. Arguimbau,* 198 U. S. 139.

And see concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 345.

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*All italics here supplied for purpose of emphasis.

From the record in the present case it appears beyond dispute: (a) that the case presented a non-federal ground of decision; (b) that this ground (violation of the State Constitution) was sufficient to dispose of the case, and (c) that the Supreme Court of Minnesota held the law to be in violation of the State Constitution, and therefore based its decision upon a non-federal ground. None of these propositions has been or can be disputed.

The State's sole argument is that the state ground of decision was not *independent* of the federal ground. In support of this argument petitioner cited five decisions of this Court (pp. 5-6, State's brief). In all of them, except the *Morehead* case (298 U. S. 587) (which is principally relied upon), the non federal ground was held to be in fact independent, and no rule was laid down by which independence or the lack of it is to be determined. The *Morehead* case was brought up on certiorari to the Supreme Court of New York to review a judgment of the Court of Appeals. A minimum wage law for women was in the Supreme Court of New York attacked on the ground of violation of both the State and Federal Constitutions. While the Court of Appeals stated that it was the contention of the relator that the law contravened the Fourteenth Amendment of the Federal Constitution, and Article I, Section 6, of the Constitution of the State, the opinion nowhere expressly declared the law to be unconstitutional under the State Constitution, but made it plainly appear that the decision was rested solely upon the decision of this Court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, holding a similar law of the District of Columbia to be in violation of the Federal Constitution. The opinion does not cite a single decision of any court of New York. The discussion of the

validity of the law includes no mention of the State Constitution, and the final declaration of the Court is that the law "is unconstitutional according to Adkins v. Children's Hospital of the District of Columbia, 261 U. S. 525". It is true that a headnote to the decision as reported in 270 N. Y. 233 recites that the law is violative of both the State and Federal Constitutions, but this is written by the state reporter and is not a part of the decision, there being no statute or rule of Court requiring such head notes to be written by the Court*. The remittitur from the Court of Appeals to the State Supreme Court expressly certified that the federal constitutional question was presented and *necessarily* passed on. This was apparently accepted by this Court as establishing that the decision of the federal question was essential to support the judgment. For this there was precedent in the cases of *Cincinnati Packet Co. v. Bay*, 200 U. S. 179; *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, and *Lynch v. New York*, 293 U. S. 52.

However, in *City of New York v. Central Savings Bank*, 306 U. S. 661, this Court apparently refused to accept a similar certificate as establishing the presence of a federal question. And see *Honeymann v. Hanan*, 300 U. S. 14.

The jurisdiction of this Court was not really disputed by the respondent in the *Morehead* case, (so far as appears from the briefs) and under all the circumstances the assumption by this Court of jurisdiction in that case cannot

*See Sec. 31, Executive Law of New York, prior to Amendment of 1938.

be regarded as establishing a qualification of the rule previously prevailing and since reaffirmed.*

In the case at bar the independence of the state ground of decision is demonstrated by the record. The question as to the validity of the law under the State Constitution was in the case from its beginning, and was urged at every stage of the proceeding.

The complaint in each of the consolidated cases contains the allegation:

> "The said Act, as plaintiff alleges, is null and void on its face, and especially by reason of the facts herein alleged, because
>
> * * * * *
>
> (4) It is in violation of Article 9, Section 1, of the Constitution of said State, in respect of the provision thereof that 'taxes shall be uniform upon the same class of subjects'." (4; 58-9)

This allegation was denied by the State. (32; 69)

The trial court in each case found that:

> "* * * the imposition of the tax, so far as measured by Section 2 (b) of the Act is in violation of *Article 9, Section 1, of the Constitution of the State of Minnesota*, and in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and is therefore void." (50; 83)

*See discussion of the decision in this case by Professor Felix Frankfurter and Adrian S. Fisher in 51 Harvard Law Review, 577 (635), in which it is said: "The majority stated that the state court held the act repugnant to the due process clauses of the State and Federal Constitutions. * * * This statement was passed over in silence by the dissenting justices, but if it was true, the court would have been without jurisdiction to review the action of the state court. * * *".

In its conclusion of law in each case the trial court declared that:

> "The gross sales tax feature of said Act, that is, the provisions imposing tax as defined and measured by Section 2 (b), is unconstitutional as being in violation of *Article 9, Section 1, of the Constitution of the State of Minnesota*, and in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and is therefore void." 54; 86)

The third headnote or syllabus to the decision of the State Supreme Court reads:

> "A gross sales tax which classifies chain store owners for the imposition of a varying rate of taxation solely by reference to the volume of their transactions denies the equal protection provision of U. S. Const. Amend. XIV, *and is likewise violative of Minn. Const. art. 9, sec. 1.*" (205 Minn. 443)

This syllabus was written by the court* as required by statute (Mason's Minnesota Statutes, 1937, Sec. 134), and is therefore equally authoritative with the body of the opinion and perhaps more so. *State v. Hauser,* 101 Ohio 404, 131 N. E. 66; *Hart v. Andrews,* 103 Ohio 218, 132 N. E. 846, 847; *Forrester v. Forrester,* 155 Ga. 722, ~~117~~ 118 S. E. 373, 375, *Corbin v. Wilkinson,* 175 Okla. 247, 52 P. (2d) 45, 47; *Adelbert College v. Wabasha R. R. Co.* (C. C. A. 6) 171 F. 805, 812; *In re Paramount Publix Corporation,* (C. C. A. 2) 85 F. (2d) 83, 85.

After briefly reviewing the history of the case, the court defined the question before it thus:

> "The question is not whether chain store owners may, for taxation purposes, be validly classified sepa-

*And see report of decision in 286 N. W. 360, where syllabi by the court and syllabi by the publisher are set out separately.

> rately from single store owners, but whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating *the constitutional requirement of uniformity.*"

In thus stating the issue in terms of "uniformity" rather than of "equal protection," the court gave strong indication that it was approaching the problem primarily from the standpoint of the State Constitution.

After saying of the trial court's findings that "These bespeak careful and conscientious study on its part," the Supreme court (page 445) continued:

> "The gross sales portion of the act in effect divides chain store merchants into 11 different classes based upon their volume of gross sales and imposes a different rate upon every such class. The different owners are taxed at different rates for performing the same acts, selling the same kind of merchandise, and at identical prices. The 'gross sales' during the taxable period is the only measure applied."

The court then quoted at length findings of the trial court said to be "especially important" bringing out the discriminatory character and operation of the Act, finally quoting the conclusion of the trial court considered to be of "*controlling* importance" that:

> "'the gross sales tax is arbitrary, unreasonable, unequal and discriminatory, and the classification * * * is without relation to the purpose of the Act and without relation to the value of the privilege for which the tax is enacted, and the imposition of the tax, so far as measured by Section 2 (b) of the Act *is in violation of Article 9, Section 1' of our constitution*, 'and in violation of Article XIV, Section 1, of the Amendments

to the Constitution of the United States, and is therefore void.'" (205 Minn. 446)

That the court meant to signify its approval and adoption of these findings and conclusion is manifest.

The court then quoted the pertinent provisions of the State and Federal Constitutions, and said:

> "*Our* cases hold (and that is the general rule) that the legislature has a wide discretion in classifying property for the purposes of taxation, but the classification must be based on differences which furnish a reasonable ground for making a distinction between the several classes. The difference must not be so wanting in substance that the classification results in permitting one to escape a burden imposed on another under substantially similar circumstances and conditions. The rule of uniformity, established by the Constitution, requires that all similarly situated shall be treated alike.' State v. Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 234, 176 N. W. 756, 757; State ex rel. Budeking v. Parr, 109 Minn. 147, 152, 123 N. W. 408, 134 A. S. R. 759; In re Improvement of Third Street, 185 Minn. 170, 240 N. W. 355.
>
> So much for our own cases."

Thus, without more, the court had condemned the Act as a violation of the Minnesota Constitution. The findings and conclusion of the trial court as to the character and operation of the Act, approved and adopted by the Supreme Court, placed it in direct conflict with the constitutional rule established by the cited Minnesota decisions, and left no escape from a decision of invalidity under the State Constitution. What the court later said about violation of the Federal Constitution was wholly unnecessary to a decision of the case.

The Supreme court further analyzed the nature of the Act (page 448) thus:

> "Obviously the tax is not one in the nature of earnings, income, or profits. The element of profit, income, or earnings is not considered in fixing the tax because sales wholly unprofitable or even if entailing a loss are taxed exactly upon the same basis as profitable sales. The only base is the volume of sales, not whether the result is a profit or loss. If it were to be considered a tax on sales the same lack of justifying relationship exists, since the rate applicable to each sale depends upon the number and size of preceding sales in the taxable year. Nor is it a privilege tax, since the amount of tax bears no relation to the value of the privilege. The different owners are taxed at different rates for performing the same act, the tax being dependent upon the frequency and amount of the various sales during the tax period. Nor do we think it can be justified as a tax upon property sold as there would be wide discrimination with respect to property of the same kind and character under different ownerships. * * *"

This further demonstrated the impossibility of the Act's satisfying the Minnesota rule of uniformity.

The cases cited by the court as illustrative of its own decisions on classification were all cases holding taxing acts void for violation of the uniformity provision of the State Constitution. In none of them was the Federal Constitution considered or a single decision of this Court cited.

The first case mentioned is *State v. Minnesota Farmers. Mutual Insurance Co.*, 145 Minn. 231, 176 N. W. 756. A tax upon the gross premiums of insurance companies was held to be in violation of the requirement of the State

Constitution that "taxes shall be uniform upon the same class of subjects". The court stated the rule in the precise words used by the court in the present case, quoted on page 15 hereof, citing as authority five of its own previous decisions.

The second case is *State ex rel. Mudeking v. Parr*, 109 Minn. 147, 123 N. W. 408, in which was called in question "an act to tax the occupation of and to license hawkers, peddlers and transient merchants". Certain provisions were held to be repugnant to the State Constitution, whether the act be regarded as a police regulation or as a taxing measure. Speaking of the act as a licensing law, the court said:

> "One of the fundamental rules controlling legislation of this character is that it must act uniformly upon all within the class."

citing five Minnesota decisions. Referring to the taxation aspect of the act and to the state constitutional requirement that taxes shall be uniform upon the same class of subjects, the court concluded:

> "Thus far we have considered the license feature only of the act. It is entitled 'An Act to tax the occupation of and to license hawkers, peddlers and transient merchants, and defining said occupations.' While removing some of the former restrictions on the methods of taxation, the amendment to article 9 of the constitution (chapter 168, p. 216, Laws 1905) specifically prescribes that taxes shall be uniform upon the same class of subjects. The legislature is not required to provide for the taxation of occupations; but if such a course is pursued, and any occupation is selected for that purpose, then the burden must fall equally upon the members of the class. Mutual Benefit Life Ins. Co.

v. County of Martin, 104 Minn. 179, 116 N. W. 572. The occupation or class designated by the act is that of peddling. Some peddlers are taxed while others are exempt, and for the reasons above stated the law cannot be sustained as a tax measure, any more than as a police regulation."

The third decision is *In re Improvement of Third Street, St. Paul,* 185 Minn. 170, 240 N. W. 355. The method by which a special assessment for local improvements was laid upon the real property benefited was held to violate the uniformity provision of the State Constitution. The requirements for validity of distribution of such assessments were discussed by the Court in part as follows:

"The applicable legal mandate is not in doubt. Given legislative authority, municipal corporations may 'levy and collect assessments for local improvements upon property benefited thereby without regard to a cash valuation,' but they must 'be uniform upon the same class of subjects'. Minn. Const. art. 9, sec. 1. * * * It is that requirement of uniformity that is violated so plainly and frequently by the Seamer rule. * * * The uniformity demanded is not the mathematical rectitude of equation or proportion. Noonan v. City of Stillwater, 33 Minn. 198, 203, 22 N. W. 444, 446, 53 Am. R. 23. There it was said to be enough to satisfy the demand for equality in taxes that a rule be 'one which will generally, and unless with accidental exceptions, apportion the burden justly, or with such approximate justice as is usually attainable in tax cases.'"

It was only after the State Supreme Court, in the present case, had contrasted the findings of the trial court with the state rule of uniformity that the court passed to a discussion of the equal protection clause of the Federal

Constitution. After an incidental mention of the *Stewart Dry Goods Co.* case (294 U. S. 550), the court took up the contention of the State that the right to classify chain stores separately for the purpose of taxation and to subclassify them according to number of stores operated had been upheld by this Court in the Indiana, Florida, West Virginia, and Louisiana cases, and it was actually in answer to that argument that the court cited the line of five decisions holding graduated gross sales taxes void for violation of the Federal Constitution. The court then closed its opinion with the paragraph relied upon by petitioner as showing that the violation of the State Constitution was not an independent ground of decision. It is:

> "We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which our attention has been called directly deciding the question presented, we are of opinion that we should follow them and that it is our duty so to do."

Of the five cases cited, only two were decided by this Court. These two decisions did dispose of the case upon the federal constitutional question, but the court had already held that the case was disposed of under the State Constitution. The reasons which persuaded the court to hold the State Constitution violated are immaterial to the inquiry as to the jurisdiction of this Court. That the court viewed the provisions of the State and Federal Constitutions to be the same in their limitation upon the taxing power of the State does not detract from the independ-

ence of the state ground. Nor does the fact that the court may have thought persuasive (in addition to its own cited decisions) the decisions of this Court in similar cases arising under the Federal Constitution convert the state question into a federal question. We cannot attribute to the Supreme Court of Minnesota any misconception as to its freedom in the construction and application of the State Constitution. In saying of the five decisions referred to that "we are of opinion that we should follow them, and it is our duty to do so," the court quite obviously meant to indicate that it regarded these decisions decisive of the federal constitutional question, but manifestly the court did not believe or intend to say that it was bound by these decisions in its construction or application of the State Constitution or that the State Constitution was necessarily violated because this Court had held in similar cases that the Federal Constitution had been violated.

There could be no greater fallacy than the proposition urged in the State's brief (pp. 9-10) that since the restrictive effect of both Constitutions is the same, and since this Court held a graduated gross sales tax violative of the Federal Constitution, the State Supreme Court therefore *"was in duty bound"* to follow the decisions of this Court and hold the Act to be in violation of the State Constitution. For the State Supreme Court to adopt this view would involve a plain abdication of its constitutional and inherent powers and duties. Article VI, Sections 1 and 2, Constitution of Minnesota; *Lading v. City of Duluth*, 153 Minn. 464, 190 N. W. 981; *In re Disbarment of Greathouse*, 189 Minn. 51, 55, 248 N. W. 735; *Reed v. Bjornson*, 191 Minn. 254, 253 N. W. 102; *Erie v. Tompkins*, 304 U. S.

64, 78-9; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 613.

The State's whole claim on the point of "independence" rests essentially upon this obvious fallacy. If the Supreme Court was free to decide the state question, and did decide it, then there is no room for question that the decision was independent.*

The State Supreme Court entertained no such false concept of its function or powers as that suggested by the State. In the very case cited by the court for the conclusion that the state and federal constitutional provisions in question were of the same effect—the recent case of *Reed v. Bjornson*, 191 Minn. 254, involving a claim that a taxing act violated both the State and Federal Constitutions—the court sharply emphasized the finality of its own decisions respecting the State Constitution. It said (p. 257):

> "We are concerned only with the sound interpretation of the constitution of this state and of the United States. If we err in our construction of the latter, our views may be corrected by the Supreme Court. *Our interpretation of our own constitution is of course final.*"

After reviewing the history of the uniformity provision of the State Constitution, the court continued (p. 260):

> "It will *help* us in the solution of the question here presented if we determine whether there is a distinction between our own constitutional provision requiring uniformity and the requirement of equal protec-

*If the court was not free, but was, as the State urges, "in duty bound" to hold the State Constitution violated, how then is error charged to the court for having so held? (State's brief, p. 30, assignment 1).

tion of the laws contained in the federal constitution. Certain legislative classifications have been questioned under the fourteenth amendment, and the judicial results *may be helpful* to us here if the two provisions are in effect the same or similar when applied to taxation. * * * *Of course the proper construction to be given our Constitution is not a federal question but one upon which our own views are controlling.*"

So far from indicating any disposition on the part of the Minnesota Supreme Court to abdicate its independent judgment in favor of this Court in cases involving the equal protection and uniformity clauses of the two Constitutions, the *Reed* case shows that the Minnesota Court is fully aware of its own authority and exercised an independent judgment even where this Court had previously construed the uniformity provision of the Minnesota Constitution. There is no room for the supposition that the State Supreme Court, in the construction and application of its own fundamental law, considered the decisions of this Court controlling or otherwise than (as said in the *Reed* case) as a "help" to be availed of only in the light of the further principle expressed in the *Reed* case that "our interpretation of our own Constitution is of course final" and "is not a federal question". In a similar sense the court no doubt found "help" in the decisions which it cited from the Supreme Courts of Wisconsin and Vermont and the Federal District Court of Florida, for which, of course, no binding effect is claimed.

The provision of the State Constitution is a specific and direct limitation upon the legislative power of taxation. The equal protection clause of the Fourteenth Amendment operates indirectly and by construction as such limi-

tation. The former might conceivably apply to a case while the latter did not. The latter does not override state constitutional provisions whose object is to secure equality of taxation. *Bells Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232. Between the provisions of the two Constitutions there is no question of dominance, subordination, or interrelation. The question of violation of one cannot be otherwise than independent of violation of the other. Therefore, even had the State Supreme Court rested its decision of violation of the State Constitution solely on the authority of decisions of this Court holding similar acts to be in conflict with the Federal Constitution, the violation of the State Constitution would nonetheless have been an independent ground of decision.

Suppose, as the utmost extreme case, that the two constitutional provisions were identical in letter as well as in effect and that the construction of the federal constitutional provision had been settled by decisions of this Court while the state constitutional provision had never been construed. Even in such case the State Supreme Court would not be "in duty bound" to follow the decisions of this Court. Rather it would be in duty bound to do otherwise if its judgment differed from that of this Court. In the final analysis, all there is to the State's point is the claim that the State Supreme Court, in holding the State Constitution violated, followed decisions of this Court on a similar question. Does then every court renounce its independence which, in construing a statute, adopts the views of a court of another jurisdiction construing a similar statute? Suppose the Supreme Court of Minnesota in this case had announced that it followed the decision of

the Supreme Court of Wisconsin in *Ed Schuster & Co. v. Henry*, and had left the decisions of this Court out of consideration, would it be said that it was the Supreme Court of Wisconsin, not that of Minnesota, that had actually passed upon the Minnesota Constitution? To say so would be hardly more absurd than to say a decision of the same court was not independent because induced by the persuasive force of decisions of this Court. In fact the claim that the Minnesota Supreme Court in holding the State Constitution violated merely applied the decisions of this Court is refuted by the opinion, which shows that the court reached its conclusion as to the State Constitution upon its own decisions before even considering the decisions of this Court. Its conclusion based upon its own previous decisions is amply sustained by them.

The trial court found the Act to be in conflict, first, with the State Constitution and, second, with the Federal Constitution. Had the State Supreme Court affirmed without opinion, this Court without doubt would have denied review upon the rule of *Lynch v. New York*, 293 U. S. 52, *McGoldrick v. Gulf Oil Corporation*, 84 L. Ed. 337, and earlier decisions cited therein. Many other like decisions could be cited, such as *Wood v. Skinner*, 139 U. S. 293, and *Bachtel v. Wilson*, 204 U. S. 36. This result would follow from the fact that it would not *affirmatively* appear from the decision of the Supreme Court that it rested *solely* upon a federal ground. For even a stronger reason should this Court refuse review where, as the record shows, the State Supreme Court not only did not make it appear that its decision rested solely on a federal ground, but did affirmatively and expressly make it ap-

pear that the decision did not rest solely, or even primarily, upon such ground, but on the contrary that it rested upon a nonfederal ground admittedly sufficient to sustain it. *City of New York v. Central Savings Bank,* 306 U. S. 661.

This Court has never attempted to lay down any general rule or formula by which "independence" of a state ground of decisions is to be determined. However, in the following cases some indication has been given as to the significance to be given to the use of the word "independent": *Pierce v. Somerset Railway,* 171 U. S. 641; *Moran v. Horsky,* 178 U. S. 205; *Giles v. Teasley,* 193 U. S. 146; *Leonard v. Railroad Company,* 198 U. S. 416; *Petrie v. Irrigation District,* 248 U. S. 154; *Mobile Railroad Company v. Mississippi,* 210 U. S. 187.

In *Giles v. Teasley,* this Court said:

> "It is equally well settled that if the decision of the State Court rests on an independent state ground—*one which does not necessarily include a determination of the Federal right claimed*—or upon a ground broad enough to sustain it without deciding the Federal question raised, this Court has no jurisdiction to review the judgment of the State Court."

In *Moran v. Horsky* it was held that laches as a bar to a federal right was a non-federal ground of state decision.

The *Petrie* case held that a decision that a federal right was prematurely asserted was upon an independent state ground.

In the *Pierce, Moran, Mobile Railroad,* and *Leonard* cases it was held that loss of federal rights by estoppel, laches, and waiver were independent state grounds of decision.

These cases show that a broad significance has been given to the word "independent" as it is used in the rule as to independent non-federal grounds of decision.

In the case at bar the state ground was clearly "independent" within the rule.

Starting from the premise that the limitations in both State and Federal Constitutions have been held alike in effect, the State draws from the opinion of the State Supreme Court the strained and unwarranted inference that therefore the court felt bound to follow the decisions of this Court construing the Federal Constitution, and was in fact so bound, and hence its decision as to the State Constitution was not independent. That the court was not so bound is too clear for serious argument. The supposition that it felt compelled by the decision of this Court is equally untenable. In *City of New York v. Central Savings Bank*, 306 U. S. 661, state and federal constitutional provisions were identical in language as well as in effect, and the Court of Appeals of New York, leaving nothing to inference, expressly declared that its holding the State Constitution violated "*followed necessarily*" from its determination "that in accordance with a long line of decisions of the Supreme Court of the United States the statute is repugnant to the Federal Constitution," and in addition declared that "a question under the Federal Constitution was duly presented and *necessarily* passed upon by this court." Yet this Court denied certiorari "for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it." Manifestly, under this decision there should be a dismissal of the writ in the present case which has a far weaker claim upon the jurisdiction of this Court than did the *Central Savings Bank* case.

Neither does this case approach the requirements laid down in *McGoldrick v. Gulf Oil Corporation*, 84 L. Ed. adv. op. 337.

The foregoing analysis and authorities demonstrate that the decision of the State Supreme Court rests upon an independent non-federal ground adequate to support it, leaving no federal question for review by this Court. The writ should therefore be dismissed. In view of Subdivision 3, Rule 7, of this Court, it is understood that a formal motion for dismissal would be improper practice.

II.

FEDERAL QUESTION RIGHTLY DECIDED.

Assuming the federal question to be properly before this Court for review, there should be an affirmance. The identical question presented has been twice decided by this Court in exact accordance with the decision of the Supreme Court of Minnesota. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550; *Great Atlantic & Pacific Tea Co. v. Valentine*, 299 U. S. 32.

A like decision was rendered by the Supreme Court of Wisconsin, and certiorari was denied by this Court. *Ed. Schuster & Co. v. Henry, Wadhams Oil Co. v. Same*, 218 Wis. 506, 261 N. W. 20; *Henry v. Wadhams Oil Co.*, 296 U. S. 625.

Petitioner attempts to distinguish the *Stewart* case, but admits impliedly at least, that the *Valentine* case is controlling of the case at bar. This Court is asked to overrule its decision in the *Valentine* case and also its decision in the *Stewart* case, if the rule of the latter case be deemed otherwise controlling.

The case at bar is squarely within the principle of both the *Stewart* and *Valentine* cases, and can only be reversed by overruling the decisions in both of those cases. In harmony with the *Stewart* and *Valentine* cases are the Wisconsin case already mentioned, a decision by the United States District Court for the Southern District of Iowa in the *Valentine* case, a decision by the United State District Court for the Northern District of Florida (*Lane Drug Stores, Inc. v. Lee*, 11 F. Supp. 672), and a decision by the Supreme Court of Vermont (*Great Atlantic & Pacific Tea Co. v. Harvey*, 107 Vt. 215, 177 A. 423). In each of these cases the court held void a graduated gross sales tax indistinguishable in principle from the Minnesota Act. See also *Safeway Stores, Incorporated v. Vigil*, 40 N. M. 190, 57 Pac. (2nd) 287.

The general principle underlying all of these decisions is one that has repeatedly been laid down by this Court. A comprehensive statement frequently quoted is found in *Louisville Gas Co. v. Coleman*, 277 U. S. 37, as follows:

> "In the first place it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, * * * and that it applies to the exercise of all powers of the State which can affect the individual or his property, including the power of taxation. * * * It does not, however, forbid classification; and the power of the State to classify for the purpose of taxation is of wide range and flexibility, provided always that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'. * * * That is to say, mere difference is not enough. The at-

tempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'"

Findings and Conclusion of Trial Court.

The gist of the facts bearing upon the constitutionality of the Minnesota Act—facts by which its conformity to the rule above stated is largely to be tested—is adequately summarized in brief by the trial court in the following findings (49-50; 82-83):

"14.

The stores of the plaintiff are distributed generally throughout the state, and are operated in both large and small cities and towns. Generally speaking, the stores are operated in direct competition with stores in the same line of business operated by other chains, by the members of voluntary chains, and by owners of single stores. Commonly in plaintiff's store locations are found competing stores involving all three types of operation. The competing chains are of various sizes as measured either by number of stores or aggregate gross sales. The result has been that these competitors have been subject to and have paid taxes under the act at various rates, both as to the specific and gross sales tax features. Thus an analysis of the taxes paid by the plaintiff and twenty-two of its principal chain competitors for the year 1934 shows that the gross sales tax average or composite rates paid by the competitors varies from .05 per cent to .85 per cent as compared with the rate of .87 per cent paid by plaintiff. The maximum rates varied from 1/20 of

one per cent to one per cent, the latter being the maximum rate paid by plaintiff. * * *

15.

As in the case of plaintiff and its competitors, it is true generally that sales made by persons taxed under any brackets of the Act are made in competition with like sales of the same character of merchandise made by persons who are taxed under other brackets of the act.

The gross sales tax is laid as an excise upon individual sales. As each sale is made liability for tax upon that sale arises. Different sales, however, take different rates, though they be of identical articles of merchandise and be made in identical manner. The rate upon any sale depends upon the number and size of sales already made in the current year. The Act therefore taxes different persons at different rates for the privilege of doing the same act, and taxes the same person at different rates for the exercise of the same privilege at different times, depending upon the number of times it has previously been exercised in a given year.

16.

In Minnesota, as elsewhere, there is no constant or uniform relation between volume of gross sales and amount or rate of net profit. There are wide variations in the profit margins as between different kinds of business and different kinds of merchandise; also wide differences in the rate of net profit made by different concerns in the same line of business for any given period; also wide variations in the rate of profit made by the same concern or concerns in any given line of business from year to year and from time to time. A

great many factors enter into the result, among which may be mentioned efficiency of management, form of organizations, expenses of operation, competitive conditions, character of community, type of patrons, proportion of high and low profit margin goods sold, and trend of commodity prices."

From these findings there inevitably followed the Court's conclusion as follows:

"17.

In the light of the foregoing findings the gross sales tax is arbitrary, unreasonable, unequal, and discriminatory, and the classification of chain store systems or concerns according to the volume of their gross sales (resulting from the graduation of the gross sales tax rates) is without relation to the purpose of the act and without relation to the value of the privilege for which the tax is enacted, and the imposition of the tax, so far as measured by Section 2 (b) of the Act is in violation of Article 9, Section 1, of the Constitution of the State of Minnesota, and in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and is therefore void." (50; 83).

and the Court's conclusion of law:

"15.

The gross sales tax feature of said act, that is, the provisions imposing tax as defined and measured by Section 2 (b), is unconstitutional as being in violation of Article 9, Section 1, of the Constitution of the State of Minnesota, and in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and is therefore void." (54; 86).

These findings (paragraphs 14, 15, and 16) were in part challenged in the Supreme Court of Minnesota, but were approved. They are again in part challenged in this Court. The findings are unassailable. They are not merely supported by the evidence, they are so indisputably established that no contrary findings could stand. The evidence upon which they rest will not be analyzed here, but will be briefly reviewed in an appendix hereto.

In an action tried to a court without a jury, its findings of fact, under Minnesota practice, are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. *Wann v. Northwestern Trust Co.*, 120 Minn. 493, 139 N. W. 107; *Freeburg v. Honemann*, 126 Minn. 52, 147 N. W. 827; *Butler v. Badger*, 128 Minn. 99, 150 N. W. 233; *Wells-Dickey Trust Co. v. Lien*, 164 Minn. 307, 204 N. W. 950; *Lowrie v. Christensen*, 165 Minn. 181, 206 N. W. 390; *Sommers v. City of St. Paul*, 183 Minn. 545, 237 N. W. 427.

Findings so established are not reviewable by this Court. *Minneapolis & St. Louis R. R. Co. v. State of Minnesota*, 193 U. S. 53; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Thomas v. State of Texas*, 212 U. S. 278; *Mammoth Mining Co. v. Grand Central Mining Co.*, 213 U. S. 72; *Rankin v. Emigh*, 218 U. S. 27; *Kerfoot v. Farmers & Merchants Bank*, 218 U. S. 281; *Pure Oil Co. v. Minnesota*, 248 U. S. 158.

The findings in the present case are not within either of the two exceptions to the rule last stated, viz.: (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and

findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389; *Creswell v. Grand Lodge*, 225 U. S. 246.

The State's brief devotes many pages (57-67) to the assembling of data from the bulletins of "Harvard University Bureau of Business Research" (dealing with experience of department and specialty stores only with a doubtful comment as to food stores) issued under the direction of Assistant Professor Carl N. Schmaltz. This data apparently is offered as evidence of some relationship between volume of gross sales and ratio of profit and as rebuttal of the contrary evidence in the case. The trial court, upon an abundance of evidence introduced before it, held the contrary. Does the State seek to charge the court with error because it based its findings upon the evidence in the case rather than upon Assistant Professor Schmaltz's bulletins, to which there is no reference in the record and of which the court probably never heard? It is difficult to comprehend what other purpose the State has in view. Assistant Professor Schmaltz was, of course, not a witness, and the soundness of his conclusions, such as they are, could not be tested by cross-examination. Many witnesses for the plaintiffs who testified to contrary conclusions were open to cross-examination upon the trial by counsel for the State, but their testimony was in no wise weakened. In addition there was further proof in the form of properly authenticated documentary evidence. In fact the distinct impression to be gained from the record is that plaintiffs' position on this issue was not seriously contested on the trial. Substantially the only rebuttal evidence offered by the State was the feeble testi-

mony of one witness—O. H. Landin—the weight of whose testimony is considered later herein. Believing that the findings of the court are to be tested by the evidence in the record, no attempt will be made to match the State's Harvard Bulletins with other published non-evidentiary literature or other Harvard Bulletins, despite the breadth of opportunity to do so.* Very pertinent in this connection is the observation of this Court in the Kentucky case (294 U. S. 550) that:

> "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume."

For documentary evidence of absence of relationship between sales volumes and profit ratios, particularly concerning department and variety stores, see Plaintiffs' Exhibit "Z", record pages 562-563, Plaintiffs' Exhibit "O.", record pages 649-651 and 658-660, and Plaintiffs' Exhibit "P.", record pages 665-670D. These exhibits are partially reviewed in an appendix hereto, pages 75 to 78.

Nature of the Act.

It is important to accurately analyze and have always in mind the precise nature of the gross sales tax and its

*For example, there might be mentioned Bulletin No. 99, page 22, where appears the conclusion that as to straight grocery chains the larger the chain the less satisfactory are the net earnings, and the same bulletin, page 24, where it is said of combination (grocery and meat) chains that there is no clear relation between size and rate of profit.

manner of operation. The following finding was made by the trial court and by the Supreme Court with approval was quoted in full and characterized as "especially important."

> "The gross sales tax is laid as an excise upon individual sales. As each sale is made liability for tax upon that sale arises. Different sales, however, take different rates, though they be of identical articles of merchandise and be made in identical manner. The rate upon any sale depends upon the number and size of sales already made in the current year. The Act therefore taxes different persons at different rates for the privilege of doing the same act, and taxes the same person at different rates for the excise of the same privilege at different times, depending upon the number of times it has previously been exercised in a given year."

This construction of the statute and determination of the nature of the tax is final and conclusive. In *Ward & Gow v. Krinsky*, 259 U. S. 503, 510, this Court, by Mr. Justice Pitney, said of a state court's construction of a workmen's compensation act claimed to violate the rights of employers under the Fourteenth Amendment:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied, to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action."

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 292, dealt with a tax described in the act as "an annual license tax." It was held to be in fact a property tax. This Court, by Mr. Justice Brandeis, said:

> "Here we are concerned only with the taxes which are alleged to be upon 'the business of owning and storing such spirits in bonded warehouses.' The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive."

In *Fox v. Standard Oil Co.*, 294 U. S. 87, 96, this court by Mr. Justice Cardozo said:

> "The complainant was at liberty to maintain a suit in the state courts where the meaning of the statute could have been determined with finality."

In *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, this Court, by Mr. Justice Holmes, referred to the "great reluctance" which the Court feels "to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned."

The nature of the Minnesota tax has been settled by the courts below exactly in accordance with the decision of this Court in the Kentucky case as to the nature of the same character of tax there involved. While there was a dissenting opinion, it did not question the majority analysis as to the nature of the tax.

While the rates are graduated according to various gross volume levels, the tax itself is not upon such volumes as units but upon each single individual sale. As each sale

is made, however small, liability for tax thereon at the applicable rate immediately arises. The rate on the sale of any particular article of merchandise (within the minimum and maximum limits) is governed by the number and amount of all other sales of all merchandise within the same year. The tax upon the sale of a pair of shoes, for example, made at one period in the year might be twenty times the tax upon the sale of an identical pair of shoes sold at the same price at another period of the year or sold by another merchant in the same period. Assume the sales of a merchant having a $1,200,000.00 annual business to be evenly distributed by months over the calendar year, and that in each month he sold a set of furniture at $100.00, all of the same kind and value. The taxes upon such sales according to the month in which made would be: January, 5 cents; February, 10 cents; March, 15 cents; April, 20 cents; May, 25 cents; June, 30 cents; July, 40 cents; August, 50 cents; September, 60 cents; October, 75 cents; November, $1.00, and December, $1.00. Twelve different merchants in the same city and on the same day might sell identical sets and incur the twelve different tax liabilities just enumerated. Could any tax be more capricious?

Act Arbitrary on Its Face.

The arbitrary and discriminatory character of the Act appears upon its face. Taxes payable in various brackets and according to volumes of gross sales are as follows:

	Volume	*Rate*	*Amount*	*Total*
First	$ 100,000	1/20th of 1%	$ 50	$ 50
Second	100,000	2/20ths of 1%	100	150
Third	100,000	3/20ths of 1%	150	300
Fourth	100,000	4/20ths of 1%	200	500
Fifth	100,000	5/20ths of 1%	250	750
Sixth	100,000	6/20ths of 1%	300	1,050
Seventh	100,000	8/20ths of 1%	400	1,450
Eighth	100,000	10/20ths of 1%	500	1,950
Ninth	100,000	12/20ths of 1%	600	2,550
Tenth	100,000	15/20ths of 1%	750	3,300
Second	1,000,000	1%	10,000	13,300
Third	1,000,000	1%	10,000	23,300
Fourth	1,000,000	1%	10,000	33,300
Fifth	1,000,000	1%	10,000	43,300

Using $100,000 volume of sales as the basis of comparison, the rate of progression for the higher volumes may be thus expressed:

2 times the volume exacts	3 times the tax
3 times the volume exacts	6 times the tax
4 times the volume exacts	10 times the tax
5 times the volume exacts	15 times the tax
6 times the volume exacts	21 times the tax
7 times the volume exacts	29 times the tax
8 times the volume exacts	39 times the tax
9 times the volume exacts	51 times the tax
10 times the volume exacts	66 times the tax
20 times the volume exacts	266 times the tax
30 times the volume exacts	466 times the tax
40 times the volume exacts	666 times the tax
50 times the volume exacts	866 times the tax

Act in Operation.

Plaintiffs' Exhibit "K" (550) illustrates the practical operation of the Act. It compares the rate of tax paid by the plaintiff National Tea Company with that of twenty-three of its principal competitors throughout the State. It shows that plaintiff's maximum rate to be twenty times that of eleven of its competitors. Its average or composite rate was nearly five times that of the highest of nineteen of its competitors and was seventeen times that of eleven of its competitors.

Another instructive exhibit is Plaintiffs' Exhibit "A", the State Tax Commission's tabulation of all taxes paid under the Act up to January 1, 1936.

Even confining the comparison to relatively large chains, those (thirty-eight in number) having gross sales in 1934 in excess of $500,000, but including chains in whatever business engaged, the discriminations are equally glaring. The average or composite gross sales rates ranged from .05 per cent to .9 per cent. National Tea Company's rate was second highest, being .871 per cent, or eighteen times the lowest for this group. Arranging the thirty-eight concerns in the groups according to average rate paid from the lowest to the highest, the National Tea Company's average rate is found to be more than eight times the highest of the first ten, more than five times the highest of the first twenty, and nearly three times the average of all. (See tabulation page 85 appendix hereto.)

In most of the lines of business represented by this group of concerns, as shown by other evidence in the record, the normal or average ratio or margin of net profit in relation to gross sales is far in excess of that which obtains in the

kind of business conducted by National Tea Company, viz., sale of groceries and foods. (e. g. See Plaintiffs' Exhibit L., table 12, p. 556). Indeed the average ratio of profit of this Company for the twelve-year period from 1923 to 1934 was but .27 per cent of gross sales, less than one-third of its tax rate in 1934. (Plaintiffs' Exhibit "E", p. 546A)

Comparison of rates paid by the plaintiff Allied Stores Corporation with other chain store merchants brings out a disparity of the same general character and degree as those affecting the National Tea Company. Its average rate was third highest. (Plaintiffs' Exhibit "A", pp. 589-596)

The light thus briefly thrown upon the operation and effect of the Act is enough to demonstrate its arbitrary and discriminatory character. The rates and amounts of tax upon those falling within the various brackets, relatively considered, rest upon no conceivable difference having a fair and substantial relation to the object of the legislation, whatever that object may be assumed to be, nor do they accord like treatment to persons similarly situated. Obviously there is no relation between the rate of tax and ratio of profit. We have here no question of adjustment of rates "with mathematical nicety." Anyone can say upon the face of the law that there is no adjustment or relation of rates to probable profit ratios or other advantage even within the widest range of tolerance. There can be no such pretense.

The State has argued that there is some evidence that the ratio of profit increases with volume of gross sales. The evidence is overwhelmingly to the contrary, and the court found to the contrary. Even assuming some such tendency, it is not, and we think will not be contended that there is

any semblance of correspondence between the *extent* of this tendency and the progression of rates under the law. The average or composite rate on five illustrative volumes of sales per annum are:

$ 100,000	.05	per cent
300,000	.1	per cent
1,000,000	.3	per cent
2,000,000	.665	per cent
5,000,000	.866	per cent

Certainly neither the legislature nor anyone else ever supposed that, because of difference in volume, the percentage of profit to sales in a $300,000 annual business was twice the percentage of a $100,000 business, or that a merchant having a $2,000,000 business would make more than twice the percentage of profit which would be obtained in a $1,000,000 business, or that in a $5,000,000 business the ratio of profit would be more than sixteen times the ratio which would be expected in a $100,000 business. The latter would mean that if a $100,000 grocery business had a net profit margin of two per cent (normal according to the evidence), a $5,000,000 grocery business would have to have a profit ratio of more than thirty-two per cent. The absurdity into which the analysis runs demonstrates not only that there is no possible correspondence between profit ratios and the upward progression of rates but also that the Act represents no legislative effort or intention of relating rates or taxes to any such factors.

If this be a privilege tax, as the State asserts, the classification is unjustifiable. While the amount of a privilege tax need not be adjusted with accuracy to the value of the

privilege, it must bear some reasonable relation thereto. *Air-way Corporation v. Day*, 266 U. S. 71.

Let the matter be considered from the standpoint of the individual sales which are the subject of the tax. Is there any difference between the sale of a loaf of bread or a pound of coffee in January as compared with the sale of a loaf of the same bread or a pound of the same coffee in July which could justify the application of different rates? The July sale may take a rate of tax twenty times as great as that of January. Does the value or importance of or profit upon a sale of any given article in any way depend upon how large an aggregate volume of sales the merchant may have previously made in the same year? Upon what possible basis can the last sale in December be made to bear a rate of tax twenty times as great as that upon the first sale in January—less than twenty-four hours later? No view as to the nature of the tax can reconcile such results with proper classification. There is no difference in the nature of the acts which occasions the tax, in the value of the privilege (if the tax be deemed upon the privilege) or in ability to pay. Ability to pay, if that be deemed a proper consideration, must be the ability to pay which is derived from the transaction in question, not the ability which arises generally from the taxpayer's resources or income.

The Act manifestly evidences a purely arbitrary and whimsical graduation of rates. It is thus brought within the condemnation of the following cases:

KENTUCKY CASE.

Stewart Dry Goods Co. v. Lewis, 294 U. S. 550.

The Kentucky Act held void in this case was identical with the Minnesota Act in every particular material to the question of its constitutionality. However, from a factual standpoint the record in the present case presents much stronger ground of invalidity than was presented in the Kentucky case. This will be considered further in discussing the minority opinion in the latter case. The Kentucky Act, like that of Minnesota, imposed a graduated gross sales tax. The minimum and maximum rates under the two Acts were identical. Generally speaking, the rates in the lower brackets were somewhat higher than the Minnesota rates, and the rates in the higher brackets were somewhat lower. The Kentucky Act was held void for violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The classification of merchants on the basis of volume of gross sales for the imposition of a graduated gross sales tax was held to be arbitrary, unequal, and discriminatory. Considered to be decisive against the validity of the Act was the absence of any reasonable or constant relation between volume of gross sales and rate or ratio of net profit. It was not in that case, and is not in the present case, a question of whether aggregate profits increase with volume of sales. The question was and is whether there is an increase in *ratio* of profit with an increase in volume of sales in correspondence with the graduation upward of the rates.

From an examination of the opinion of this Court in the Kentucky case, it can be readily seen that every fact, every feature of the law, and every consideration which led to

the condemnation of the Kentucky Act has a complete parallel in the present case as reflected in the record and the decisions of the courts below. It probably is needless to compare the two cases point by point. The State claims but one distinction between the cases. (State's brief, pp. 103-4). The suggestion is that the Kentucky Act applied to all stores, and that the tax was therefore not strictly a chain store tax. The supposed distinction is irrelevant and invalid. The Kentucky Act was held unconstitutional not because it applied to single stores as well as to chain stores or because it failed to classify chain stores separately from single stores. It was held void because it classified retail merchants for a graduated imposition by the use of gross sales as the gradient. The vice in the Act would be present whether the tax was on single stores, on chain stores, or on both. It will not, we think, be said that there is any closer relationship between gross sales and rate of net profit in the case of chain stores than in the case of single stores. If not, how could the elimination of single stores improve the Act from a constitutional standpoint? With respect to those remaining within the scope of the Act, it would be open to the same charge of discrimination and inequality that it was before and would be equally indefensible. Chain store owners as between themselves are entitled to equal protection of the laws, whether the discriminatory law complained of does or does not also apply to the owners of single stores. Otherwise stated, the discrimination under the Kentucky Act was not one that applied in any sense as *between* single store retailers as a class and chain store retailers as a class. It applied equally to both. It applied just as clearly between the owner of two stores and the owner of three stores, or between the owner of three stores

and the owner of three hundred stores, as it did between the owner of one store and the owner of any other number of stores. The discrimination was between retailers having different volumes of gross sales subjecting them to different rates in a graduated scale. Equal protection of the laws and uniformity of taxes upon the same class of subjects require not only that the primary classification shall be justified by differences germane to the purpose of the law, but also that all those within a given primary class shall be accorded like treatment. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Airways Corporation v. Day*, 266 U. S. 71; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23; *Mutual Benefit Life Insurance Co. v. Martin*, 104 Minn. 179, 116 N. W. 572; *State ex rel. Mudeking v. Parr*, 109 Minn. 147, 123 N. W. 408; *State v. Pocock*, 161 Minn, 376, 201 N. W. 610. The rule has been aptly expressed by the Supreme Court of Minnesota as follows:

> "While a statute may be limited in its operation to a specified class, to be valid it must apply alike to all who are within that class and must not exclude from its operation any who are under the same conditions and in the same situation as those to whom it applies."
>
> *State v. Luscher*, 157 Minn. 192, 194, 195 N. W. 914, 915.

And again:

> "It has been sometimes loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. No only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification

it must bring within its influence all who are under the same conditions."

Johnson v. St. P. & D. R. Co., 43 Minn. 222, 224, 45 N. W. 156, 157.

In asking this Court to overrule its decision in the Kentucky case, the State places great stress upon the dissenting opinion in that case. In this connection we desire to point out that the present case presents a very different situation for application of the minority view than did the Kentucky case. In the latter case the federal district court below had sustained the Kentucky Act. The minority view was, in essence, that the decision below could be affirmed and the Act sustained on the theory that the record permitted the conclusion that there was a relation of correspondence between the amount of business done and capacity to pay the tax, and that it was at least open to question as to whether there was not an increase in profit ratio corresponding with increase in volume of sales. The court below apparently had made no finding on this point, the evidence being in conflict, but had found that "as a general proposition, increased volume of sales results in increased profits and increased ability to pay the tax." At the outset the minority opinion of this Court pointed out that the Kentucky Act had been held valid by the Supreme Court of Kentucky in the case of *Moore v. State Board of Charities and Correction*, 239 Ky. 729, 40 S. W. (2d) 349. In its decision in that case the Supreme Court of Kentucky found as follows:

"Thus the proof establishes that the ratio of net gain either to sales or to capital invested is very much higher in the case of large scale merchants than in the case of small scale ones, whether the large scale ones

be of the chain store type, or of the department store type, or even of the specialty store type."

Thus there was in the Kentucky case a situation directly opposite to that in the case at bar, in which the evidence in the record, the findings of the trial court, and the decision of the state supreme court all establish beyond dispute (for the purposes of this case at least) that there is no relationship between volume of sales and rate or percentage of profit. Also there is the further general finding and determination that the classification resulting from the graduation of rates is "without relation to the purpose of the Act and without relation to the value of the privilege for which the tax is exacted" (50; 83). This was one of the findings which the Supreme Court regarded as being of "controlling importance" (205 Minn. 446). Elsewhere the Supreme Court stated the issue thus (448):

> "So the question is: Does this classification rest upon any ground having a rational relation to the subject of the enactment?"

The court then proceeded to apply every test deemed determinative, with a negative conclusion as to each. It declared in part:

> "Obviously the tax is not one in the nature of earnings, income, or profits. The element of profit, income, or earnings is not considered in fixing the tax because sales wholly unprofitable or even if entailing a loss are taxed exactly upon the same basis as profitable sales. * * * If it were to be considered a tax on sales the same lack of justifying relationship exists, since the rate applicable to each sale depends upon the number and size of preceding sales in the taxable year. Nor is it a privilege tax, since the amount of tax bears no relation to the value of the privilege. The different own-

ers are taxed at different rates for performing the same act, the tax being dependent upon the frequency and amount of the various sales during the tax period. * * * *"

Thus, it will be seen that the record against the validity of the Minnesota Act goes far beyond the record submitted to this Court in the Kentucky case, upon which both majority and minority opinions were in that case based.

IOWA CASE.

Great Atlantic & Pacific Tea Co. v. Valentine, 299 U. S. 32 (12 F. Supp. 760).

The State does not claim that there is any material distinction between the facts of this case and those of the case at bar. It impliedly admits that this Court cannot reverse the present case without overruling its decision in the Iowa case. The ground upon which the State claims to distinguish the Kentucky case is absent. The Iowa tax, like that of Minnesota, was a combination of specific (per store) tax and a graduated gross sales tax, and was imposed admittedly with respect only to chain stores.

A statutory three judge federal district court held the specific tax valid but struck down the gross sales tax on the authority of the decision of this Court in the Kentucky case. The gist of the opinion on the gross sales features of the tax appears from the following language of the court:

"While the Iowa chain store tax law here under consideration is in some particulars different from the Kentucky statute under consideration by the Supreme Court in the Stewart Case, supra, we are of the opinion that as we find and have found that there are similar controlling facts in the two cases, that this case is

governed by the pronouncements in the Stewart Case.

The classifications are different, as in the case at bar the tax under consideration is only imposed upon retail stores having more than one separate unit, while under the Kentucky statute the classification included all retail stores. * * * Another difference is that the Kentucky statute provided for a percentage tax on each graduated classification of gross sales, while under the Iowa law the tax is a flat amount on each such graduated classification.

In these particulars the cases are different, but we are unable to say that such differences permit the escape of a similar condemnation as being arbitrary and discriminatory under the pronouncements in the Stewart Case. * * * The limitation in the classification to the taxation of chain stores only could not change the nature of the tax, and this would be true, giving consideration to the distinctive business species of the chain stores and all economic and welfare questions which are brought about by their advantages in making sales. Such questions might well bear on the propriety of the classification, but not on what constitutes the form or nature of a tax."

This decision was affirmed by this Court in a per curiam opinion upon the authority of its decision in the Kentucky case. *Valentine, et al. v. Great Atlantic & Pacific Tea Co.*, 299 U. S. 32.

This disposes of any contention that the principle of the decision of this Court in the Kentucky case does not extend to what is strictly and technically a chain store tax.

WISCONSIN CASE.

Ed. Schuster & Co. v. Henry,
Wadhams Oil Co. v. Same, 218 Wis. 506, 261 N. W. 20.

This again is a case indistinguishable from the case at bar. It involved a graduated gross sales tax upon chain stores. Although it was styled a tax upon "gross income," the Supreme Court of Wisconsin held "gross income" as defined by the Act to be in fact gross sales. The tax was held to be in violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution, the Court relying largely on the *Stewart* (Kentucky) case.

That the factual basis for the decision corresponds with that in the case at bar is plainly indicated by the following excerpt from the opinion of the court in reference to certain allegations of the complaint and the conclusions to be drawn therefrom:

> "Those statistics all demonstrate that there is no constant or reasonable relation between gross income and net income or between the gross income and the size, in so far as the number of stores is concerned, of an integrated chain, or between its gross income and its ability to pay a tax imposed at rates increased progressively for the higher brackets of its gross income, and that consequently there is no reasonable relation between such graduations in the rate of taxation and the actual relative value to the parties taxed of the privilege which is enjoyed by each of them as an operator of a chain store, and which constitutes the subject that is taxed. * * *"

The contention made by the State in the present case that the *Stewart* case is distinguishable on the ground that the Kentucky tax was not purely a chain store tax but ap-

plied to all stores was made in the Wisconsin case and disposed of as follows:

> "Although upon its face the Kentucky statute differs from section 76.75, Stats., in that, while under the Kentucky statute a retail merchant operating but one store is likewise subjected to the tax, under section 76.75, Stats., only those operating two or more stores under the same general management, supervision, or ownership are to be taxed, that difference does not constitute such a material distinction in the legal consequences under the statutes as to obviate the vice because of arbitrary and unreasonable discrimination between the proprietors who are included in the taxed class under section 76.75, Stats. * * *"

Application by the State to this Court for writ of certiorari was denied. *Henry v. Wadhams Oil Co.*, 296 U. S. 625.

VERMONT CASE.

Great Atlantic & Pacific Tea Co. v. Harvey, 107 Vt. 215, 177 A. 423.

The Vermont tax, like that of Kentucky, was a graduated gross sales tax applicable to all retail merchants. In declaring the law unconstitutional and void, the Supreme Court of Vermont said:

> "It serves no purpose to determine the nature of this tax whether a 'chain store tax' or not, or whether an excise tax or a tax upon property. The fundamental question has been decided since the argument of this case, by the Supreme Court of the United States in Stewart Dry Goods Co., et al., 55 S. Ct. 525, * * * in which the validity of the gross sales tax of Kentucky was in issue."

FLORIDA CASE.

Lee Drug Stores v. Lee, (D. C. N. D. Fla.) 11 F. Supp. 672.

Subdivision B of Section 4 of the Florida Act imposed a so-called graduated gross receipts tax, graduated not according to volume of sales but according to number of stores operated by each merchant, the rates ranging from one-half of one per cent of gross receipts on the operator of one store to five per cent of gross receipts on the operator of more than fifteen stores. A statutory three judge federal district court held the graduated gross receipts tax invalid as being in violation of the Fourteenth Amendment of the Federal Constitution—so plainly so as to render any discussion superfluous. The court said.

> "It is unnecessary to discuss subdivision B of section 4 of the act, because the decision in Stewart Dry Goods Co. v. Lewis, 55 S. Ct. 525, 79 L. Ed. 1054, decided March 11, 1935, by the Supreme Court of the United States, fully sustains the contention of plaintiffs that subdivision B of section 4 of the act is so arbitrary, unreasonable, and discriminatory that it denies to these plaintiffs equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution."

NEW MEXICO CASE.

Safeway Stores Incorporated v. Vigil, 40 N. M. 190, 57 P. (2d) 287.

This case involved a so-called "license or occupation tax." It was a tax levied in specified amounts according to volume of gross sales, the amounts being graduated upward

through eleven brackets. It applied, however, only to retail dealers who sold "in small parcels, packages, bales, boxes, or other containers of whatever kind and not in gross." The court indicated the view that the graduated feature was sufficient to condemn the act under the authority of the Kentucky case, but ultimately placed its decision upon the arbitrary classification of merchants indicated by the above quotation.

Of the many other decisions of this Court condemning taxing acts because of arbitrary classification, the following are representative: *Southern Railway Co. v. Greene*, 216 U. S. 400; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Bethlehem Motors Co. v. Flynt*, 256 U. S. 421; *Kansas City Southern Ry. v. Road Improvement District*, 256 U. S. 658; *Air-Way Corporation v. Day*, 266 U. S. 71; *Louisville Gas Co. v. Coleman*, 277 U. S. 37; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389.

Every court, whose decision has been reported, that has considered the constitutionality of a graduated gross sales tax under the equal protection clause of the Fourteenth Amendment has condemned it, except the Federal District Court in the Kentucky case, which was reversed in this Court, and the Supreme Court of Kentucky construing the same Act. The State has cited no other decision upholding such a tax. It has cited certain decisions for which it claims analogy. One heavily emphasized is *Pacific American Fisheries v. Alaska*, 269 U. S. 269. The tax involved was a license tax upon salmon canning in Alaska. The opinion of this Court is devoted mainly to the question of the legislative power conferred by the Organic Act of Alaska. No objection to the tax was raised involving the Fourteenth Amendment. The only

constitutional claim was that the Act contravened the due process clause of the Fifth Amendment. This was disposed of very briefly in the opinion. In the statement of facts preceding the opinion of the Circuit Court of Appeals (2 F. (2d) 9), it is said that the ground upon which it was claimed that the statute contravened the Constitution of the United States was that it was an interferences with interstate commerce. This case is of little significance.

The State also cites five decisions of this Court (beginning with *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527) upholding taxes on chain stores graduated according to the number of stores in the chain (State's brief, p. 69). The tax involved in each of these cases was strictly an occupational or license tax as contrasted with the gross sales tax now in question. In these occupational tax cases this Court held generally, on the records before it, that the classification of chains separately from single stores was not arbitrary but justified; that there was a relationship between the number of stores in a chain and the progression in rate of tax; that the enhancement in the value of the privilege of chain store operation arising from the addition of a store to a chain was not represented only by the added store, but extended to all stores in the chain; that the operation of a chain of stores constitutes a form and method of merchandising apart from that adapted to the practice of ordinary individually operated stores. The tax involved in these cases was distinctly a chain store tax, and the decisions were distinctly chain store decisions. The tax was radically different in nature and operation from that now under contest, which is a tax on individual sales. While the Minnesota tax is a chain store tax in the sense that it does not fall upon single store merchants, it is not

essentially so. The distinctive characteristic of chain store systems which is thought to set them apart as a separate "business species" for the purpose of taxation is multiplicity of stores. The peculiar value of the privilege taxed is said to consist in having many retail outlets in many locations under one direction and control. A true chain store tax, therefore, is one in which the amount of the tax, and the rate if graduated, depends upon the size of the chain measured by number of stores. Such factors are foreign to the sales tax. Neither the amount nor the rate of the tax bears any necessary relationship to the size of the taxpayer's chain measured by stores, either in theory or fact. A ready illustration is furnished by the two plaintiffs. National Tea Company, with 155 stores in the State, had gross sales in 1934 of $5,288,845.00 and paid a gross sales tax of $45,222.51, while for the same year Allied Stores, with two stores in the State, had gross sales of $9,714,374 and paid a gross sales tax of $40,902.38. Furthermore, in none of the occupational chain store tax cases had the taxing act before the court been condemned by the highest court or any court of the state imposing the tax. In none of them were there, as in the present case, findings and conclusions of the trial court and of the highest appellate court of the state analyzing the character, operation, and results of the tax and condemning it for inequality and determining it to be "arbitrary, unreasonable, unequal, and discriminatory, * * * without relation to the purpose of the Act and without relation to the value of the privilege for which the tax is enacted."

All of these facts and considerations set the present case apart from the occupational tax cases and show the principle of those cases to be inapplicable.

MISCELLANEOUS ASSIGNMENTS OF ERROR.

Assignment 2

Police Power.

This assignment is that:

> "The Supreme Court of Minnesota erred in considering only the revenue aspect of this tax and in failing to consider that this tax was levied also for the police power purpose of restraining undue expansion of chain stores."

This assignment is untenable for several reasons:

(1) There is no suggestion in the act and no evidence in the case that the law was passed as a police measure or other than a taxing act. It professes to be the latter. Its title reads:

> "And Act raising revenues, imposing a tax on conducting business by the system of chain stores," etc.

This Court may not indulge in any speculative assumption that the Act in purpose is something other than what it appears on its face or is shown by the evidence to be.

Of a similar claim this Court, in *Liggett v. Lee*, 288 U. S. 517, said:

> "The suggestion is made that the statute is in reality aimed solely at large corporate chains; * * * But this is to construe the act by pure speculation and not by what it says, nor by any declared purpose, nor by anything contained in the record. * * * We are not permitted to guess at any such undisclosed purpose in the minds of those who adopted the statute. Assuming power to suppress by taxation a form of organization deemed inimical to the public interest, we

can attribute no such motive to the present statute in the absence of legislative declaration or record proof."

Again:

"To attribute such a covert, hidden, and indirect purpose to those who passed the statute is in effect to charge the lawmakers with saying one thing and meaning another."

And again:

"Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid."

(2) This argument was made in the Supreme Court below. Its opinion contains no discussion of the point. This does not signify that the point received no consideration. The State's claim was by necessary implication rejected. This may have been because the Court took the view either (a) that the Act did not represent an exercise of the policy power or (b) that as a police measure it was no more justifiable than as a tax act. The second conclusion would have been in accord with the Court's previous decisions.

State v. Parr, 109 Minn. 147, 123 N. W. 408.
State v. Pocock, 161 Minn. 376, 201 N. W. 610.
State v. Luscher, 157 Minn. 192, 195 N. W. 914.

If the first mentioned view was taken, that concludes the matter in this Court. No federal question would be involved. If the second view was taken, that also is con-

clusive at least in respect to conflict between the Act and the State Constitution.

The correct conclusion appears to be that the Supreme Court agreed with the trial court that "the Act in question is essentially a revenue measure" (43, 77). In its decision as originally filed, the trial Court found that the Act was for the purpose of raising revenue and also "in the exercise of the policy power, for the purpose of curbing the undue expansion of chain stores." On reconsideration the Court amended its decision by striking out the finding that the Act was adopted in the exercise of the police power, leaving only the finding that it was essentially a revenue measure. The Supreme Court affirmed the trial Court without taking exception to any of its findings or conclusions, and therefore must be deemed to have given them approval. It is unnecessary to again argue that the State Supreme Court's interpretation of the Act and determination of its character in respect to its being a tax or police measure is final. That point has been heretofore covered. In the Kentucky, Iowa, and Wisconsin cases similar laws were regarded as taxing acts rather than police measures. The State's claim that the Act must be regarded, in part at least, as a police regulation is predicated mainly on the presupposition that chain stores are a menace to the general welfare, and therefore it must be assumed that the legislature, in adopting the Act, was aiming to protect the public against this menace. The premise is false, as will be shown in the discussion of the next following point. The court below determined that chain stores were not inimical to the interests of the people of the State of Minnesota. This determination upon a pure question of fact is not subject to question or review in this court.

(3) Even assuming the Act to be a police measure, it is condemned by the equal protection clause of the Fourteenth Amendment of the Federal Constitution. There can be no arbitrary classification for the purpose of police regulation any more than for the purpose of taxation. Police power is not free of constitutional restraint. Its exercise must meet the test of due process and equal protection prescribed by the Fourteenth Amendment. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Eubank v. City of Richmond*, 226 U. S. 137, *Adams v. Tanner*, 244 U. S. 590; *Adkins v. Children's Hospital*, 261 U. S. 525; *Burns Baking Co. v. Bryan*, 264 U. S. 504; *Meyer v. Nebraska*, 262 U. S. 390; *Near v. Minnesota*, 283 U. S. 697; *Southern Railway Co. v. Virginia*, 290 U. S. 190; *State v. Pocock*, 161 Minn. 376, 201 N. W. 610; *State v. Luscher*, 157 Minn. 192, 195 N. W. 914.

~~is unnecessary to again argue that the State Supreme~~

In *Eubank v. City of Richmond* what this Court said of police power is well summarized in the first headnote, which reads:

> "While the police power of the State extends not only to regulations promoting public health, morals and safety but also to those promoting public convenience and general prosperity, it has its limits and must stop when it encounters the prohibitions of the Federal Constitution."

(4) The State's position on the point as defined by its answers to plaintiffs' complaints is equivocal. The complaints allege that:

> "The said Act was adopted as and purports to be a taxation for revenue measure only" (3, 58).

This was admitted in the State's answer in each case (31-2; 68-9).

The complaints also allege:

> "Said Act was not adopted by the legislature in the exercise of the police power of the State" (3, 57).

This was denied (31-2; 68-9).

There is no affirmative allegation in the State's answers that the Act was a police measure, and its denial of a contrary allegation of the complaints is inconsistent with and contradicted by its admission that the Act was a tax measure for revenue only.

Assignment 3, with
Subdivisions (1) *to* (5), *inclusive.*

This assignment is that the Supreme Court of Minnesota erred in failing to hold that the development of chain store groups in Minnesota had certain injurious effects upon the general welfare. By this presumably is meant that the Supreme Court erred because it did not find that the trial court erred in failing to find injury to the general welfare in the development of chain stores.

The refusal of the trial Court to so find was deliberate. As stated under the last point the court originally made such finding. Upon motion to amend the court's attention was called to the lack of support for such finding in the record, whereupon these findings were stricken out (40-54; 74-87). This was assigned as error in the State Supreme Court but the assignment was not sustained. Notwithstanding all this, the State persists in twice setting out those findings in its brief (pp. 22, 52), in addition to quoting them in its assignments of error (p. 30), and treats them as

facts and argues that this Court should take judicial notice as *facts* of the matter stricken (p. 52). It is said that "uncontradicted evidence lends support to *most of them*" (p. 53), "as is fully shown in the statement of facts." That there is no substantial evidence in support of any of the findings in question "shown in the statement of facts" or otherwise will be brought out in review of evidence, p. 87-90 Appendix. The State's argument that the Act is to be regarded as a police measure rests largely upon the assumption that the so-called "facts" suggested by the stricken findings are established instead of being repudiated. For example, it says (p. 53): "When the Minnesota legislature of 1933 met to consider chain store legislation, it was confronted with the *facts* to which we have just called attention, namely," * * * and then there is recited as facts the substance of the rejected findings, and the brief continues: "With these *facts* before them, the legislature passed the Chain Store Act of 1933." And "in the light of these *facts* it is inconceivable that the Act could have been passed otherwise than for the dual purpose of raising revenue and to curb the undue expansion of chain stores. * * *"

Eliminate the false assumption that any such supposed *facts* had been established and the whole argument falls. There is nothing to impeach the conclusion of the court below that the Act is essentially a revenue measure, even were that conclusion here subject to review.

Incidentally, the State's claim of injury to the general welfare appears to rest essentially upon the conception that any growth of chain stores which tends in any degree to replace singly operated stores of necessity injures the public welfare; that chain store competition is always and

inevitably bad; that the public interest is synonymous with single store operation. The idea that chain stores' competition is successful only because people like to patronize them or that the consuming public is the beneficiary of competition between chains and individual stores does not appear to enter into the State's consideration of the general welfare.

In considering this assignment, it may be that the Supreme Court took the view (which would be correct) that the findings sought by the State could not affect the result in the case in relation to the gross sales tax. There was no issue either as to advantage of chain stores as a class (to which the State's brief has devoted much space) or as to the effect on general welfare of conducting business in that form. The constitutional objection to the graduated gross sales tax is not one of classification between chains and single stores. It is a question of arbitrary classification of chain stores as between themselves. As said by the Supreme Court in its opinion below:

> "The question is not whether chain store owners may, for taxation purposes, be validly classified separately from single store owners, but whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating the constitutional requirement of uniformity."

In view of the nature of the issue, no finding that chain stores have advantages or are inimical to the general welfare could affect the conclusion as to the invalidity of the Act. No court, we think, has ever held that equal protection of the laws may be withdrawn from those who fall

under legislative disfavor for whatever reason, or that there may be discrimination in taxation between the members of a disfavored class, saying which is not intended as an assent to any assumption that such disfavor has existed or exists in the State of Minnesota.

Admittedly chain store systems have certain advantages over single stores, but it is also true that single stores have not a few advantages over chains. (Plaintiffs' Exhibit "N", Census of Distribution, page 9, discussing advantages and disadvantages. This page appears not to be printed. In the opinion of competent students of the subject, it is not possible to say where the balance of advantage lies (253-254).

In respect to the question of the effect of chain stores on the general welfare, while the conclusions of the courts below are not subject to review in this Court, we will nevertheless, for the Court's information, in the event it should have any desire to examine the matter, undertake to show that the action of the courts below was the only one justifiable by the record. For this purpose a review of the evidence upon the matter appears in the appendix hereto, pages 87 to 90.

Assignment 4

Composite Tax.

The State advances the theory that the gross sales tax is saved from unconstitutionality by the fact that it is coupled with the specific tax, which it is said produces a more equitable result than would the specific tax alone. This is not the question. We are concerned with the validity of the gross sales tax. That tax standing alone is

void under the decisions of this and other courts. If a void tax can ever be validated by legislative marriage with a valid tax (a novel theory), the question here would be whether the gross sales tax is rendered less iniquitous by its alleged union with the specific tax. The contrary is true. If Exhibit "K" (page 550 of the record) is examined, it will be found, for example, that the discrimination against the plaintiff National Tea Company, as compared with its competitors, resulting from the gross sales tax exaction is in almost every instance aggravated rather than lessened by the inclusion of the specific tax. Any tendency of the specific tax to compensate for inequality in the gross sales tax would be purely accidental. As between two taxpayers having different volumes of gross sales, it obviously would occur only if the one having the larger volume of sales had the smaller number of stores, the reverse of which would be true in the generality of cases. Even if the influence of the specific tax could properly be taken into account in passing judgment upon the gross sales tax, the effect on the whole would be adverse rather than favorable. Any tendency in given cases for the specific tax to offset the inequality of the gross sales tax, would at best be haphazard, irregular, and ineffective to materially overcome the discrimination inherent in the gross sales tax. How feeble the equalizing influence, if any, of the specific tax would be may be judged from the fact that for 1934, the only full year for which both specific and gross sales taxes were generally paid, the gross sales taxes collected constituted eighty-nine per cent (89%) of all taxes collected under the Act. (See Plaintiff's Exhibit A, 589-596).

The gross sales tax and the specific tax are not in any real sense a "composite" tax. The Court below in its conclusions of law referred to the Act as imposing a "composite occupational tax." The inaccuracy of the characterization appears on the face of the Act. That the Court did not recognize any real interpendence or interrelation between the two features of the Act is shown by its holding one valid and the other void, and by its finding that "the provisions of the Act imposing and providing for the collection of a gross sales tax are separable from the rest of the Act."

Except that they have certain administrative provisions in common and that the proceeds are appropriated to a common purpose, there is no unity between the specific and gross sales taxes, any more than if imposed by separate acts. The two taxes are different in principle; they are imposed by separate subdivisions. The specific tax is payable annually in advance, the gross sales tax annually for the calendar year preceding payment. The gross sales tax is payable on all gross sales made in the taxable year while the specific tax is computed solely on the number of stores in operation July 1 of each year. A chain might therefore be liable for a gross sales tax without any liability for a specific tax. Returns of gross sales are required but not of stores. This, however, probably was an oversight. The fact that both taxes are in form imposed by one act does not assimilate them into one tax.

In neither the Iowa nor the Florida case did the fact that the graduated gross sales tax was enacted in combination with a specific tax save it from unconstitutionality.

Assignment 5.

What the Supreme Court said as to the tax being an excise on individual sales is precisely what was said of similar taxes by this Court in the Kentucky case, by the Federal District Court of Iowa in the *Valentine* case, and by the Supreme Court of Wisconsin in the *Schuster* case.

Assignment 6.

This asserts the claim that the Supreme Court erred in holding that the gross sales tax is not a privilege tax. In discussing this assignment (State's brief, p. 117), the State argues that the Supreme Court did not so hold; that it merely held that the gross sales tax was not a *valid* privilege tax. This interpretation of the language of the court seems to be the reasonable and correct interpretation. In the passage from the opinion referred to, the court was testing the validity of the Act on all possible theories as to the nature of the tax, and concluded that on no theory could it be held valid. It declared the tax to be an excise on individual sales, but made no determination as to whether it could be properly regarded as a "privilege" tax. Whether it was such does not appear to be of any particular importance on the question of validity. As a privilege tax, as heretofore shown, the classification or rate or amount of tax bears no relation to the value of the privilege.

The other assignments have been covered heretofore.

From the foregoing it appears that the Act offends the Equal Protection clause of the Fourteenth Amendment, and if this Court exercises jurisdiction to determine the

constitutional question involved the decision below should be affirmed.

Respectfully submitted,

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APPENDIX.

Analysis of Plaintiffs' Evidence Supporting the Findings of the Trial Court, Quoted on Pages 29 to 31 Hereof, and Review of Testimony Relied Upon by Defendant on the Issues Covered by Those Findings.

The competitive situation in the State of Minnesota of the National Tea Company was thoroughly covered by the testimony of the following witnesses: Waldemar John Larson, branch manager of the Company (90-94), William A. Pfister (121-139), Nels D. Coryden (136-150), Frank Steigler (184-188; 192-194), all district supervisors, and the situation of Allied Stores Corporation by Stanley Roth, vice president and managing director of the Golden Rule Department Store in Saint Paul (207-211), and Howard R. Malcolm, treasurer and comptroller of the L. S. Donaldson Department Store in Minneapolis (280-283).

PAUL D. CONVERSE was and for twelve years had been professor of marketing in the University of Illinois. He had devoted twenty-one years to the study of retail distribution, with considerable special attention to marketing by chain stores. He was the author of five books and many articles on marketing, selling policy, and distribution.

He testified that there does not seem to be any relation between volume of sales and ratio of net profit; that there are wide variations from year to year in the ratio of net profit in any line of retail business, wide variations in the ratio of net profit between retail concerns in the same line of business in the same place and period, and variations between the average profit ratio in any given line of retail business as compared with other lines. Among the factors producing such variations, the witness mentioned the influence of changing commodity prices and the lack of uniformity in the effect of this factor upon different lines of business; also the operating expense factor, the percentage of which, in relation to sales, the witness observed, tended to increase after leaving small stores until the $20,000 volume level was reached, from which point it went down until after passing the $30,000 volume class, and then again went up. (248-254).

H. R. GERWIG was a professional statistician and analyst of financial statements and investment securities, specializing in the analysis of leading chain store companies in all lines of business and in making reports thereon covering the subjects of sales, net profits, and related matter. Speaking from long experience in this line of activity, he testified, in substance, as follows:

All his studies indicated an absence of any uniformity in percentage of net profit to gross sales as between different lines of business. For example, in 1934 chain grocers averaged less than two per cent, while chain variety stores ranged in excess of six per cent. Chain stores in the shoe, furniture, and drug business would range between those figures. The same differences would be found in any previous or subsequent years. There are wide differences in the percentage of profit realized in any given line of business from year to year as well as in the ratio of profit earned by different companies or firms in the same line of business in any given year. The average of chain store grocery concerns for 1934 of somewhat less than two per cent included companies operating at a loss as well as companies showing a profit in excess of three per cent. These differences are typical. No definite relation can be established. The Great Atlantic & Pacific Tea Company in 1915 earned in excess of four per cent on its sales, a figure which the company has never since equaled although its sales have multiplied forty times over what they were in 1915. There is no relation between volume of gross sales and ratio of net profit for any business concern, be it a single store or a chain. Liggetts, the largest drug store chain, was forced by losses into receivership, while Walgreens, the second largest, had splendid success. Concerns smaller than Walgreens earn a larger percentage of profit. The largest concern in any chain store system as a rule earns the smallest percentage of profit to sales. It seems to be the penalty for becoming large. As respects a growing concern, the general rule to be sensed is that the larger a chain's sales become in dollars, the smaller the percentage of profit to

sales seems to become. There will be variations between years, but the trend will be downward (215-221).

To illustrate his testimony, Mr. Gerwig prepared a series of tabulations, which were introduced as Plaintiff's Exhibit "O," record, pages 648 to 665. These tabulations contrast the gross sales and net profit ratios for the years 1932, 1933, and 1934 of twenty leading department store chains (except that for 1932 the number was nineteen), eight leading drug store chains (except that for 1932 the number was six), eighteen leading grocery chains, and ten leading variety store chains (except that number for 1932 was nine). The range of profit ratios for the years mentioned ("L" indicating loss) were as follows:

DEPARTMENT STORE CHAINS

	High	Low	Average
1932	3.49	L. 6.55	0.96
1933	7.96	L. 2.30	2.89
1934	7.61	L. 1.30	3.08

DRUG STORE CHAINS.

	High	Low	Average
1932	5.72	L. 3.64	3.35
1933	6.26	L. 5.63	3.38
1934	7.08	L. 0.51	4.93

GROCERY CHAINS.

	High	Low	Average
1932	4.18	L. 3.19	2.42
1933	6.27	L. 1.57	2.45
1934	5.79	L. 1.14	1.93

VARIETY STORE CHAINS.

	High	Low	Average
1932	6.38	L. 0.32	4.85
1933	8.34	3.21	6.91
1934	8.04	3.08	6.85

Finally the compilation sets out the sales volume, earnings history, and profit ratios of five typical large chains over periods of many years. The chains used for the purpose were The Great Atlantic & Pacific Tea Company, S. S. Kresge Company, National Tea Company, J. C. Penney Company, and The Walgreen Co. If any tendency is discernible, it is one of diminishing profit ratios with increase in volume of gross sales rather than the contrary.

JESSE S. ROBINSON was professor of economics at Carleton College, Northfield, Minnesota, which subject includes marketing of merchandise at retail. He is the author of textbooks and many articles within his field. He testified that there are wide variations in profit ratios as between different kinds of business, regardless of whether the businesses considered be those of single stores, chain stores, or of the so-called voluntary chain type; that this is true for any year examined. He described the result of a special study for the year 1933 by Professor Vaile of the

University of Minnesota in a typical Minnesota town—Waseca—which showed the profit ratios in terms of percentage of gross sales for various lines of retail business as follows:

Groceries and meats	3.31 per cent
Drugs	.39 per cent
Restaurants	13.42 per cent
Candy	2.74 per cent
Men's clothing	2.62 per cent
Farm equipment	2.27 per cent
Furniture, hardware and plumbing	1.15 per cent
Lumber, feed and fuel	2.31 per cent
Filling stations	1.65 per cent

(302-308)

STANLEY ROTH, Vice President and Managing Director of the Golden Rule in Saint Paul, gave particularly illuminating testimony on this subject, covering the ground broadly and also in particular reference to his own department store experience. We particularly commend to the attention of the Court the very intelligent testimony of this witness on pages 200 to 215 and 224 to 232 of the record. His testimony gives further certainty to the conclusion that there is no relation between the volume of sales and the rate of profit, and furnishes convincing reasons why this is true.

Testimony on this subject was also given by William E. Russell, Comptroller of the National Tea Company, based upon the experience of that company in its own business. The same conclusions were reached (105-110; f. 116-117).

There were introduced reports of the Federal Trade Commission of a study of chain store distribution conducted by direction of The Senate of the United States. The study covered generally a series of years between and including 1913 to 1930, and included such matters as sales, operating expenses, gross and net margins of profit, and the like. A number of the tables of this report are reproduced as portions of Plaintiff's Exhibit "L" on pages 621 to 623 of the record. One of the most significant of the tables in relation to the present subject is Table 12, appearing on page 623 of the record. It shows the percentage of net operating profit to sales of twenty-six lines of chain store business for the years studied. Arranging the list from the lowest to the highest, the average percentages for all years considered were as follows:

NET PROFITS IN PERCENTAGE OF GROSS SALES.

Hats and caps (Loss)	.42
Variety (unlimited)	.23
Men's furnishings	.75
Dry goods	1.15
Musical instruments	1.58
Grocery	2.10
Millinery	2.36
Men's ready-to-wear	2.39
Meat	2.45
Tobacco	2.68
Women's accessories	2.69
Groceries and meat	2.82
Variety ($5 limit)	2.88
Men's and women's shoes	3.17

Hardware	3.24
Women's shoes	3.45
General merchandise	3.66
Drugs	4.21
Women's ready-to-wear	4.35
Department store	4.45
Men's shoes	4.64
Dry goods and apparel	5.93
Confectionery	6.04
Men and women's ready-to-wear	8.84
Variety ($1 limit)	9.16
Furniture	11.46

Compared with the grocery business, in which the plaintiff National Tea Company is engaged, the ratio of net profit to sales for certain other lines as shown by this table is:

Hardware	150 per cent
Drug and department stores	200 per cent
Dry goods and apparel	250 per cent
Confectionery	300 per cent
Men's and women's ready-to-wear clothing	400 per cent
Variety stores ($1 limit)	450 per cent
Furniture	550 per cent

Table 3, page 552, shows the wide range of gross margins, operating expense ratios, net operating expense, and net profit ratios for the same twenty-six lines of business. Table 10, page 553, deals with percentages of gross margins to sales by years, and Table 11, page 554, the percentage of operating expenses to sales by years.

Table 32, page 558, deals with the percentage of net operating profit to sales by kind and size of chains for all years combined, size of chains being considered in terms of number of stores only, not by volume of sales. The Commission found a tendency for net dollar profit to increase with the number of stores in a chain in nine lines of business. For seventeen lines no such tendency was found, including seven lines showing a downward trend. The upward tendency seen by the Commission for the nine lines in question is at best very irregular and ill-defined. The Commission expressed no opinion that there was any discoverable relation in any group of chains between volume of sales and rate of profit.

Plaintiff's Exhibit "Z" (page 562) is a comparison for 1934 of sales volume, profits, rate of profit for thirty singly operated department stores and fifteen department store chains. The comparison between volume positions and the profit ratio positions for the single department stores is as follows:

Position Volume	Net Profit %	Position Volume	Net Profit %
1	11	16	28
2	17	17	1
3	21	18	9
4	19	19	23
5	15	20	12
6	13	21	4
7	7	22	14
8	10	23	29
9	6	24	5
10	20	25	22
11	30	26	24
12	2	27	26
13	27	28	18
14	3	29	16
15	25	30	8

The same comparison in respect of the department store chains shows the following:

Position Volume	Net Profit %	Position Volume	Net Profit %
1	1	9	4
2	..	10	6
3	10	11	5
4	3	12	9
5	8	13	11
6	12	14	2
7	7	15	13
8	14		

A great deal of other statistical evidence was introduced by plaintiffs negativing any correspondence between sales volume and profit ratios. Plaintiff's Exhibit "P" (665-670 D) is a report for 1934 of the Comptroller's Congress of the National Retail Dry Goods Association, a national association of department and specialty stores having several thousand members distributed over the United States (230-231). Table 3 of the report, (670 A and B) shows the greatest contrast between gross profit, expense ratios, and net profit margins in different departments and on different kinds of merchandise. These figures are typical (231). Table 7, of the report, (670 C and D) is a summary of operations of department stores for 1932 and 1933, broken down into departments and grouped according to volume of sales. Similar analysis of the operation of specialty stores is shown except that volume grouping is omitted. Various other portions of the report were introduced (665-670). The net operating results for the years 1932, 1933 and 1934 of all volume groups as shown by the exhibit were as follows (profits being indicated by "P" and losses by "L"):

Sales Volume	1932	1933	1934
$ 500,000 to $ 1,000,000	L. 7.9	L. 0.7	P. 1.3
$1,000,000 to $ 2,000,000	L. 6.6	P. 0.4	P. 0.8
$2,000,000 to $ 5,000,000	L. 5.3	L. 0.8	P. 0.1
$5,000,000 to $10,000,000	L. 5.5	L. 1.5	P. 0.4
Over $10,000,000	L. 6.1	L. 1.1	L. 0.6

A tendency appears in both the years 1933 and 1934 for the ratio of profit to run inversely to volume of sales and for the ratio of loss to increase with increase of volume.

Sundry statistics as to operating expense ratios, showing wide divergence between different kinds of business, are found in the Federal Census of Retail Distribution for Minnesota and United States. Plaintiff's Exhibits "B", "D", and "N" (597-603; 613-620; 637-647).

Plaintiff's Exhibit "Y" (561) is an illustrative comparison of the operating results for the year 1934 of twenty different departments of the Donaldson Store of Minneapolis showing a range of from nine per cent profit for notions to 26.2 per cent loss for girls' wear.

Even the State itself furnished corroboration of plaintiffs' position on this phase of the case. Joseph Strong, formerly owner of a chain of sixty to seventy millinery stores and a witness for the State, testified on cross-examination that there cannot be any relation between ratio of profit and gross sales (464).

TESTIMONY OF O. H. LANDIN.

The only witness on behalf of the State who asserted the existence of a relationship between volume of sales and rate of profit was O. H. Landin, former manager of the Minneapolis branch of the National Tea Company. The portion of his testimony on this point was as follows:

> "Q. In your connection with the chain store business, did you notice any relationship between the amount of gross sales in a given store and rate of profit from that store?
>
> "A. Yes.

"Q. What was that relationship, the rate?

"A. It would depend on the sales of the store, the bigger the sales usually the better return on the profit. The more sales you have your overhead goes down and the net profit goes up.

"Q. Was that a general experience among the majority of your stores?

"A. Yes, on many of them.

"Q. From your experience in general store business, do you know whether there is any relationship between the size of a chain and the rate of net profit in a number of stores?

"A. It would depend on how many warehouses and how much ground they cover.

"Q. If a man had one warehouse then the more stores he operated out of that warehouse the overhead would be less?

"A. But with more warehouses the overhead would be a different proposition.

"Q. As a general rule, then would you say there is a relationship between the size of the chain and the rate of net profit?

"A. Yes.

"Q. And does that rate of net profit go up and down with the size of the chain?

"A. It depends on circumstances. It would go up if you supplied 500 stores out of one warehouse. Then you show more profit than if you supply only two hundred stores out of that same warehouse. It depends if they are all in one state or one town" (363-364).

No facts or figures were furnished in support of the conclusions, such as they were, of this witness. His suggestion that the bigger the sales of a store "usually the better return on the profit" is effectively refuted by the actual figures for all National Tea Company stores in Minnesota

for a typical year—1935 (Plaintiff's Exhibit "V" (671). This exhibit is a demonstration that the amount of net profit of individual stores does not vary with the volume of sales from such stores. For example, the store showing the largest net profit is twenty-second in volume of sales, and the store showing the largest net loss is fifth in volume of sales. Similar comparisons could be made throughout the list.

On cross-examination Mr. Landin admitted that the grocery business was all he knew anything about, and that he was not presuming to give any opinion about any other line of business (405-406).

Since Mr. Landin was the principal witness for the State on this and other subjects, some comments bearing upon the weight which should be given his testimony are in order. His connection with the National Tea Company terminated in March, 1933. On the trial in April, 1936, he came into Court as a witness for the State, bringing a file of letters and papers belonging to the Company which he had taken from its office from time to time and had retained in his possession since his employment terminated. To explain his possession of these files he testified on direct and cross-examination:

"Q. Has the National Tea ever requested you to return any correspondence or invoices or letters which you have in your possession?

"A. No.

"Q. They remain in your possession simply because the National Tea has not called for them?

"A. Yes.

"Mr. Doherty: Does the National Tea Company know that you have them?

"A. I don't know, I don't think so.

"Mr. Doherty: You have no reason to believe they do know?

"A. I never thought anything about it." (323)

Most of the letters dealt with so-called confidential allowances, and Landin claimed that it was their confidential character that prompted him to take and keep them (329). Why his successor was entitled to less confidence than he with respect to them was not explained, nor did he explain the greater confidence he reposed in counsel for the State, to whom his possession of the letters was disclosed the day before he testified and to whom he delivered them the morning before he went on the witness stand (331-2). The nature of the special discounts in question was explained (415-419). The confidential communication theory failed because the letters taken and kept by Landin included letters to which even he did not extend the claim of confidence, at least not with any insistence (365). Most of the letters (Defendants Exhibits 3 to 18) had on them notations (omitted in the printing) showing that upon receipt they had passed through the hands of the office manager, apparently in routine fashion (380-7). Mr. Landin's conception of his right to appropriate these letters belonging to his former employer is significant. On cross-examination with respect to one of them he testified:

"Q. Why isn't this document in the hands of the National Tea Company?

"A. Because it was made out and given to me.

"Q. It wasn't given to you as an individual George Landin?

"A. My name isn't George, I don't like to be called George.

"Q. I apologize. What are your initials?

"A. O. H.

"Q. This letter came to you as manager of the National Tea?

"A. It might not, but I was manager at that time.

"Q. It wouldn't come to you otherwise?

"A. No, no manufacturer would have given me such information otherwise.

"Q. You aren't making any claim this came to you in any other capacity except as manager of the National Tea?

"A. No.

"Q. Therefore, it is a document that belongs to the National Tea?

"A. It doesn't belong to them.

"Q. Who does it belong to?

"A. It belongs to me.

"Q. How does it come to be your property?

"A. Because I have got it.

"Q. Anything in your possession is your property?

"A. Anything in my pocket is mine." (377)

He pretended to be an unwilling witness for the State (330-1), whereas his whole testimony showed the greatest eagerness to testify against his former employer. His testimony showed a lack of any broad comprehension upon the subjects upon which he undertook to speak. Indeed his testimony evidences a general confusion of ideas. To illustrate, he testified to certain advantage of large over small chains. An effort on cross-examination to elicit his idea as to where the line should be drawn between the two classes of chains led to the following:

"Q. There has been constant use of the term large chains and comparison is made between large chains and small chains and independents.

"A. Yes.

"Q. What do you mean by a large chain?

"A. Anyone who has two or three hundred, one thousand or fifteen hundred stores.

"Q. What is it, two or three hundred or one thousand or fifteen hundred?

"A. It is not what I mean. Anything having one hundred or more would be a large chain.

"Q. Then you have been referring to a large chain as having one hundred or more stores?

"A. I would say Thomas has a chain of 30 stores and he is as bad off as anybody.

"Q. Will you please try to follow the questions and answer them?

"A. Then I would say if you have 25 stores it is a large chain.

"Q. Are you sure you wouldn't want to go down any lower?

"A. No, a chain of less than 25 stores don't amount to an awful lot." (410-411)

To suggest that the unimpressive testimony of this witness, uncorroborated and unsupported by either facts or figures, is sufficient to raise a serious issue against the mass of contrary evidence previously reviewed, would be wholly out of reason.

SEVERITY OF DISCRIMINATION.

Plaintiff's Exhibit "K" is an analysis of the taxes paid under the Act for the year 1934 by the National Tea Company and twenty-three of its principal competitors, including those most frequently encountered throughout the State. It shows that the average or composite gross sales tax rate paid by National Tea Company was higher than that paid by any of its twenty-three competitors. The next highest rate in order paid was that of Hahn Department Stores, Incorporated (now Allied Stores Corporation). Excepting four chains, the rate paid by National Tea Company was nearly five times that of its highest competitor. Its average rate was seventeen times that of eleven of its twenty-three competitors. Its maximum rate was twenty times the maximum rate of eleven of its competitors. Only four of its competitors paid a maximum rate equal to that paid by it. Comparison of rates paid by Hahn Department Stores, Incorporated, with others on the list brings out a disparity of the same general character and degree as those affecting National Tea Company.

A comparison limited to large chains shows equally glaring discriminations. Below is a list of all chains having gross sales for 1934 in excess of $500,000 with the average or composite gross sales tax rate paid by each:

Name of Taxpayer	Kind of Business	Composite Gross Sales Tax Rate in Percentage of Gross Sales
Dayton Co.	Department stores	.050
Michaud Bros.	Foods	.050
Standard Clothing Co.	Clothing	.050
Cardozo & Bros.	Furniture	.063
New England Furniture Co.	Furniture	.066
Savage Co., M. W.	General merchandise	.076
Miner Co.	Automobiles	.100
Davis & Ruben	Furniture	.104
Motor Power Equipment Co.	Appliances	.105
International Harvester Co.	Implements	.107
Salet's Department Store	General merchandise	.121
Snyder Cut Rate Drug	Drugs	.121
Holt Motor Co.	Automobiles	.130
Salkin & Linoff	General merchandise	.131
Scott Burr Store Co.	Variety stores	.134
Witt's Market House	Foods	.142
Northern States Power Co.	Appliances	.146
Liggett Drug Co.	Drugs	.150
City Market Co., Inc.	Foods	.163
Western Auto Supply Co.	Automobile supplies	.166
Gergohgolis Economy Market	Foods	.168
Stevenson, Inc., L. T.	Women's wearing apparel	.176
Piggly Wiggly N. W. Inc.	Foods	.182
Grant, W. T. Co.	Department stores	.193
Sears Roebuck Co.	General merchandise	.279
Quality Food Stores, Inc.	General merchandise	.419
Gamble Skogmo, Inc.	Automobile supplies	.506
Rothschild & Co., M. L.	Clothing	.509
Thomas Stores, C.	Foods	.616
Kresge Co., S. S.	Variety stores	.667
Walgreen Co.	Drugs	.673
Great Atlantic & Pacific Tea Co.	Foods	.698
Red Owl Stores	Foods	.793
Montgomery Ward & Co.	General merchandise	.813
Woolworth Co., F. W.	Variety stores	.824
Hahn Department Stores	Department stores	.859
National Tea Co.	Foods	.871
Penney Co., J. C.	General merchandise	.900

This tabulation is made up from Plaintiff's Exhibit "A" (589-596), an analysis by the State Tax Commission of all taxes paid under the Act up to January 1, 1936. Even within the half million dollar volume class the rates paid by the plaintiffs National Tea Company and Hahn Department Stores were more than seventeen times higher than those of three other chains. Those paid by the remaining chains fell into various intermediate brackets.

The National Tea Company's average rate of net profit in Minnesota for the twelve-year period from 1923 to 1934 was 27 per cent of its gross sales (Plaintiff's Exhibit "E", 546). In 1934 it operated at a loss of 1.97 per cent. Its gross sales tax for 1934 was .871 per cent, which was more than three times its average profit rate for the twelve-year period. The Golden Rule Store, of Allied Stores Corporation, in 1934 operated at a loss of 1.3 per cent of sales while paying a gross sales tax of .85 per cent. It also had losses of 1.26 per cent and 3.97 per cent for the years 1929 and 1932 respectively and a profit of 0.51 per cent, 0.55 per cent and 0.17 per cent for the years 1930, 1931 and 1933 respectively. (Plaintiff's Exhibit "Q", 560).

Review of Evidence Concerning the Effect upon the General Welfare of Conducting Business by the System of Chain Stores.

On this question the State relies almost entirely, so far as the evidence goes, upon the testimony of O. H. Landin, a former employe of the plaintiff National Tea Company. In the statement of facts, where the claimed support for the State's position is said to be "fully shown" (State's brief, p. 53), reference is made solely to the testimony of this witness (State's brief, pp. 22-23).

Mr. Landin, by his own admission, was incompetent to give any general testimony upon the subject. He testified:

> "Q. You testified here about various comparisons between chain and independent stores and volunteer stores in regard to advantages. I suppose in your testimony you were referring to the grocery business?
>
> "A. That's all I know anything about.
>
> "Q. You are not presuming to give us any opinions about any other lines of business?
>
> "A. No.
>
> "Q. So we understand when you were testifying about large and small chains you were referring to chains in the grocery line only?
>
> "A. Yes." (405-406)

The State claims chain stores to be economically harmful in the following particulars:

(a) That the chains have been taking over a large portion of retail business and eliminating single stores (22; 52). This, of course, begs the question, presupposing that the general welfare is better served by single stores than it would be by chain stores. The evidence cited by the State on the point is limited to Mr. Landin's individual practice

and experience as former manager of the National Tea Company in Minnesota (354-355; State's brief, p. 23).

(b) That chains have eliminated jobbers and wholesale houses and reduced the number of traveling salesmen, and thereby added to unemployment and lessened the value of taxable property in the State (22; 52). The evidence claimed for this is again the testimony of Mr. Landin found on pages 361 and 362 of the record. The question put to him concerned the effect of the coming in of chain stores on Twin City jobbers, as to which he testified that many of them had gone out of business in the last few years; that the chains had transferred their business from local jobbers to other sources; that there were a considerable number of salesmen eliminated. To the question then asked, "Did it then add to unemployment in Minnesota?" he answered, "I think it did to some extent." On cross-examination he said of the unemployment claim, "but that is years past now." He also admitted that he thought the same thing, that is unemployment followed in the development of the volunteer or cooperative chains (438), which are classed as single stores under the Minnesota Act.

This is the character and extent of the testimony on which the State claims the court should have made a general finding that the development of chain stores had produced unemployment.

(c) That the chains have caused the farmers throughout the State to find a less ready market for their fruits and vegetable products (53). No citation to the record is given for this. The only reference to it is in the testimony of Mr. Landin, appearing on pages 355-357 of the record, to the effect that when he was manager of the National Tea Company he purchased most of his requirements of vege-

tables on the Minneapolis market "except in the summer time when we could get them from the farmers." He said the fact that he brought vegetables to country stores from the Minneapolis market would be likely to tend to lower the prices of vegetables in country towns (356). Since the practice was carried on only when the farmers themselves had no vegetables to sell, his reasoning is difficult to follow. He further testified that he got a considerably lower price than independent stores because of large scale buying, and because truckers were willing to accept lower prices in return for a sure market for their products (356). On cross-examination he testified that the great bulk of the consumption of vegetables and farm products by customers of the National Tea Company was in the large cities, who were supplied from the markets, except that in the summer time most of the farm products were bought direct from the farmers; that purchases of vegetables were made from Texas and California when they were not available in Minnesota (435). As to why the National Tea Company was able to buy below the market he admitted the reason to be that farmers preferred to take lower prices in order to avoid the necessity of "standing on the market for four or five hours disposing of it little at a time" and not being sure they could sell even then; that as a rule he bought from the same farmers year after year (436). Two other employes of the National Tea Company, including the fruit and vegetable buyer for the entire territory, testified that country stores of the Company bought locally practically all the farm produce needed so long as available, and that the practice was to pay the market price or better; that the price paid to farmers who hauled to Minneapolis was the regular Minneapolis market price;

that the same farmers have been continuously selling to the Company for as long as fifteen years and have been entirely satisfied (492-3; 495-8; 499-500). That any Court upon this testimony could have found that the chain stores have caused farmers throughout the State to find a less ready market for their fruit and vegetable products is inconceivable.

(d) That money has been drawn from country banks, thereby weakening the banking structure in rural communities.

The testimony cited in support of this is once more that of Mr. Landin, reported at pages 360 and 361 of the record, the substance of which is that when he was manager of the Minneapolis division of the National Tea Company he kept the bulk of the National Tea Company's money in Minneapolis banks. From this meager testimony as to Mr. Landin's individual practice, the State would have the Court make the broad general finding above indicated.

As to the general weight to be given any testimony of the witness Landin, some observations have already been made on pages 80 to 83 hereof, and need not be repeated. It is submitted that the court would have been justified in disregarding any uncorroborated testimony of this witness. From the sketchy and unconvincing testimony of such a witness, it would have been gross error for the court to have made the sweeping general findings proposed by the State under its assignment 3 (State's brief, p. 30).

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SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1939.

State of Minnesota, Petitioner,
vs.
National Tea Company and Allied Stores (Formerly Hahn Department Stores, Incorporated).

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[March 25, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1933 Minnesota enacted a chain store tax (L. 1933, c. 213) one item of which was a tax on gross sales. Sec. 2(b). The gross sales tax was graduated: one-twentieth of one per cent was applied on that portion of gross sales not in excess of $100,000; and larger percentages were applied as the volume of gross sales increased, until one per cent was exacted on that portion of gross sales in excess of $1,000,000. Respondents (chain stores conducting retail businesses in Minnesota) paid under protest the gross sales tax demanded by the Minnesota Tax Commission for the years 1933 and 1934 and thereafter sued in the state court for refunds.[1] Judgments granting refunds were affirmed by the Supreme Court of Minnesota, 205 Minn. 443. We granted certiorari because of the importance of the constitutional issues involved in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, which cases, it was asserted, controlled the decision below.

At the threshold of an inquiry into the applicability of the *Stewart* and *Valentine* cases to these facts, we are met with a question which is decisive of the present petition. That is the question of jurisdiction.

[1] Extra Sess. L. 1933-1934, c. 16, § 1. Respondents also paid under protest that portion of the chain store tax which was based upon the numbe of stores within the state. L. 1933, c. 213, § 2(a). That item of the composite tax was upheld by the lower court in Minnesota from which no appeal was taken. The gross sales feature of the 1933 chain store tax was eliminated in 1937. Extra Sess. L. 1937, c. 93.

The Supreme Court of Minnesota discussed not only the equal protection clause of the Fourteenth Amendment of the federal constitution but also Art. 9, § 1 of the Minnesota constitution which provides: "Taxes shall be uniform upon the same class of subjects . . . ." It said that "these provisions of the Federal and State Constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation."[2] It stated that the "question is . . . whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating the constitutional requirement of uniformity." It quoted the conclusion of the lower Minnesota court that the statute violated both the federal and the state constitution. It then adverted briefly to three of its former decisions which had interpreted Art. 9, § 1 of the Minnesota constitution and quoted from one of them.[3] It merely added: 'So much for our own cases'; and proceeded at once to a discussion of cases based solely on the Fourteenth Amendment of the federal constitution. While its discussion of Art. 9, § 1 of the Minnesota constitution was in general terms, its analysis of the Fourteenth Amendment was specifically related to chain store taxation. It distinguished decisions of this Court which held that the number of stores in a given chain affords an appropriate basis for classification for imposition of progressively higher taxes.[4] It then stated that the "precise question here presented" had been directly passed upon adversely to the state's contention in five cases: *Stewart Dry Goods Co. v. Lewis, supra; Valentine* v. *Great Atlantic & Pacific Tea Co.*,

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[2] 205 Minn., p. 447. The court here cited Reed v. Bjornson, 191 Minn. 254.

[3] This reference to Minnesota constitutional law was limited to the following:

"Our cases hold (and that is the general rule) that the legislature 'has a wide discretion in classifying property for the purposes of taxation, but the classification must be based on differences which furnish a reasonable ground for making a distinction between the several classes. The differences must not be so wanting in substance that the classification results in permitting one to escape a burden imposed on another under substantially similar circumstances and conditions. The rule of uniformity, established by the Constitution, requires that all similarly situated shall be treated alike.' State v. Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 234, 176 N. W. 756, 757; State *ex rel.* Mudeking v. Parr, 109 Minn. 147, 152, 123 N. W. 408, 134 A. S. R. 759; In re Improvement of Third Street, 185 Minn. 170, 240 N. W. 355."

[4] State Board of Tax Commissioners v. Jackson, 283 U. S. 527; Liggett Co. v. Lee, 288 U. S. 517; Fox v. Standard Oil Co., 294 U. S. 87; Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412.

supra; Ed. Schuster & Co. v. *Henry*, 218 Wis. 506; *Lane Drug Stores, Inc.* v. *Lee*, 11 F. Supp. 672; *Great Atlantic & Pacific Tea Co.* v. *Harvey*, 107 Vt. 215. It added that the tax here involved was on all fours with that struck down by this court in *Stewart Dry Goods Co.* v. *Lewis, supra.* It quoted with approval from the opinion in *Ed. Schuster & Co.* v. *Henry, supra.* And it concluded with the following statement:

"*We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented* as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which our attention has been called *directly deciding the question presented* we are of opinion that we should follow them and *that it is our duty so to do.*"[5] (Italics added.)

Respondents contend that the court held the statute invalid for violation not only of the federal constitution but also of the state constitution. Hence they seek to invoke the familiar rule that where a judgment of a state court rests on two grounds, one involving a federal question and the other not, this Court will not take jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52; *New York City* v. *Central Savings Bank*, 306 U. S. 661. In support of this position they point to the court's discussion of the Minnesota constitution and to the fact that the syllabus states that such a tax is violative of both the federal and state constitutions.[6] But as to the latter, we are not referred to any Minnesota authority which, as in some states,[7] makes the syllabi the law of the case. And as to the former the opinion is quite inconclusive. For the opinion as a whole leaves the impression that the court probably felt constrained to rule as it did because of the five decisions which it cited and which held such gross sales taxes unconstitutional by reason of the Fourteenth Amendment. That is at least the meaning, if the words used are taken literally. For if, as stated by the court, the "precise question here presented" was ruled by those five cases, that question was a federal one. And in that connection it is perhaps significant that the court stated not only

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[5] 205 Minn., p. 451.

[6] By statute the court is required to prepare the syllabus. Mason's Minn. Stats. 1927, § 134.

[7] See State v. Hauser, 101 Oh. St. 404, 407; Hart v. Andrews, 103 Oh. St. 218, 221; Thackery v. Helfrich, 123 Oh. St. 334, 336.

that it "should follow" those decisions but that "it is our duty so to do."

Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, *Honeyman* v. *Hanan*, 300 U. S. 14, consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

But that does not mean that we should dismiss the petition. This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *Patterson* v. *Alabama*, 294 U. S. 600. That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment, where the record failed adequately to state the facts underlying a decision of the federal question, and where the grounds of the state decision were obscure. *Honeyman* v. *Hanan*, *supra*, and cases there cited. That principle was also applied in *State Tax Commission* v. *Van Cott*, *supra*, where it was said, p. 514:

"... if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law."

The procedure in those cases was to vacate the judgment and to remand the cause for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated.

In this type of case we deem it essential that this procedure be followed. It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review. *State Tax Commission* v. *Van Cott*, *supra*. On the other hand we cannot be content with a dismissal of the petition where there is strong indication, as here,

that the federal constitution as judicially construed controlled the decision below.

If a state court merely said that [illegible] the Fourteenth Amendment, as construed by this Court, is the "supreme law of the land" to which obedience must be given, our jurisdiction would seem to be inescapable. And that would follow though the state court might have given, if it had chosen, a different construction to an identical provision in the state constitution. But the Minnesota Supreme Court did not take such an unequivocal position. On the other hand, it did not declare its independence of the decisions of this Court, when the state constitutional provision avowedly had identity of scope with the relevant clause of the Fourteenth Amendment. In the latter respect this case differs from *New York City* v. *Central Savings Bank, supra.* The cases in which the New York Court of Appeals professes to go on both the state and federal due process clauses clearly rest upon an adequate nonfederal ground. For that court has ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court. See *Ives* v. *The South Buffalo Railway Co.*, 201 N. Y. 271, 317. The instant case therefore presents an intermediate situation to which an application of the procedure followed in *State Tax Commission* v. *Van Cott, supra,* is peculiarly appropriate.

It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the

states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

It is so ordered.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1939.

State of Minnesota, Petitioner,
vs.
National Tea Company and Allied Stores Corporation (formerly Hahn Department Stores, Incorporated).

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[March 25, 1940.]

Mr. Chief Justice Hughes (dissenting):

I think that sound principle governing the exercise of our jurisdiction requires the dismissal of the writ. I see no reason to doubt that the Supreme Court of Minnesota held that the tax in question was laid in violation of the uniformity clause of the State Constitution. Not only is that shown, as it seems to me, from the court's discussion of that question, but it conclusively appears from the syllabus which definitely states that the tax is "violative of art. 9, § 1, of our state constitution". 205 Minn. 443. Minnesota requires that in all cases decided by the Supreme Court it shall give its decision in writing, "together with headnotes, briefly stating the points decided". Mason's Minn. Stat., Sec. 134. In obedience to the statute, the court has thus given explicitly in its syllabus its own deliberate construction of what it has decided.

The decision thus rested upon an adequate non-federal ground and in accordance with long-established doctrine we are without jurisdiction. *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 210.

This is not a case where the record leaves us in uncertainty as to what has actually been determined by the state court. *Honeyman* v. *Hanan*, 300 U. S. 14, 23, 26; *State Tax Commission* v. *Van Cott*, 306 U. S. 511. Nor have there been supervening changes since the entry of the judgment. *Gulf, Colorado & Santa Fe Rwy. Co.* v. *Dennis*, 224 U. S. 503, 507; *Patterson* v. *Alabama*, 294 U. S. 600, 607. I find no warrant for vacating the judgment on either of these grounds.

The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provision of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the federal constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand. It cannot be supposed that the Supreme Court of Minnesota is not fully conscious of its independent authority to construe the constitution of the State, whatever reasons it may adduce in so doing. As the Minnesota court said in *Reed* v. *Bjornson*, 191 Minn. 254, 257, after referring to the question presented under the federal constitution, "Our interpretation of our own constitution is of course final".

The disposition of this case is directly within our recent and unanimous ruling in *New York City* v. *Central Savings Bank*, 306 U. S. 661. In that case, the Court of Appeals of New York had decided that a state statute was repugnant to the due process clause of the state constitution, that clause being the same as the due process clause of the Fourteenth Amendment which the court held had also been violated. 280 N. Y. 9, 10. We declined jurisdiction upon the ground that the judgment of the state court in applying the state constitution rested upon an adequate non-federal ground, despite the reliance upon our decisions.

Mr. Justice STONE and Mr. Justice ROBERTS join in this opinion.